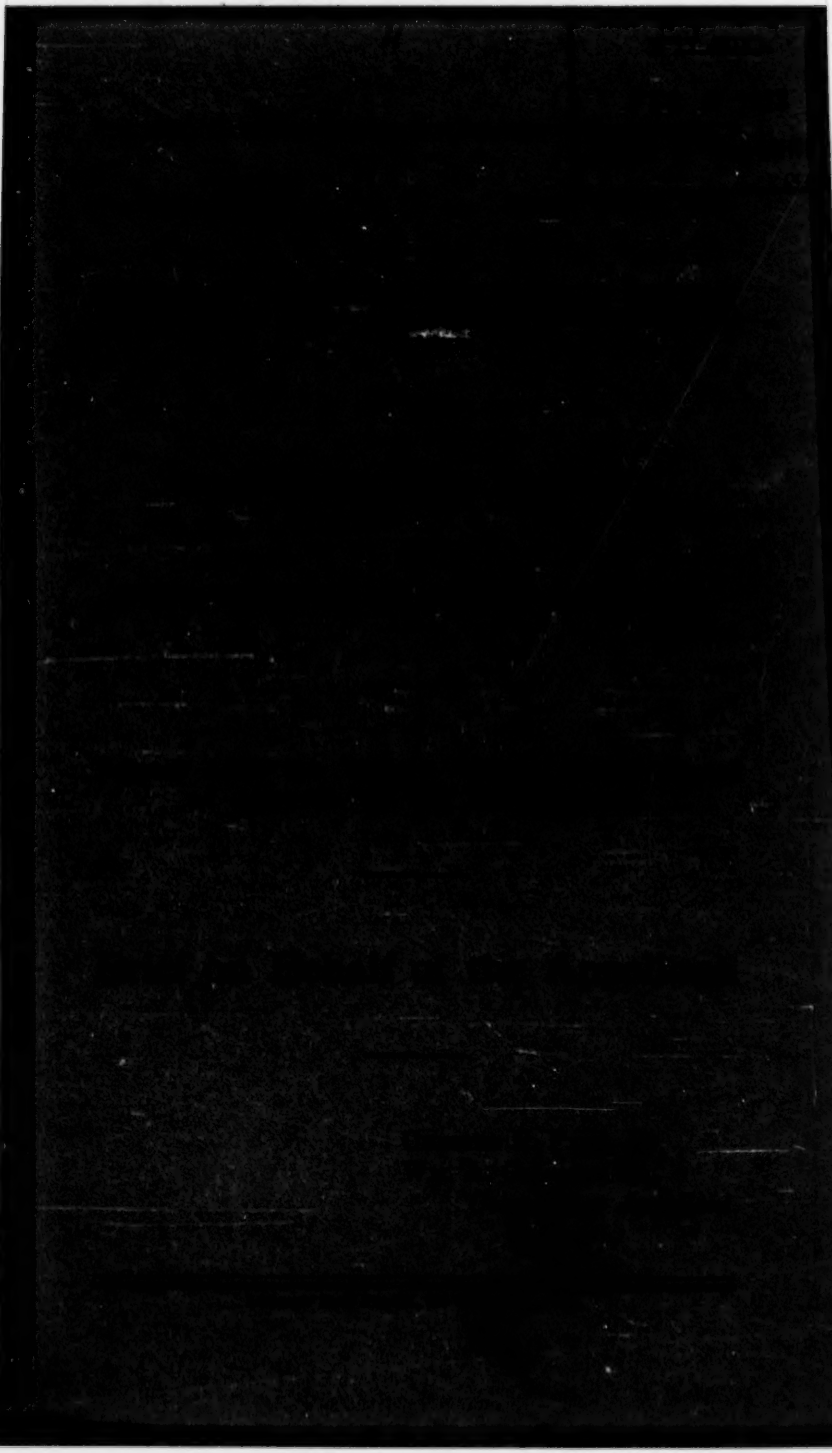

IN THE

Supreme Court of the United States.

No. 488. October Term, 1911.

MORRISDALE COAL COMPANY,
Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF THE APPELLANT.

I. STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

This was an action brought March 3rd, 1908, by the Morrisdale Coal Company, appellant, against the Pennsylvania Railroad Company, appellee, for damages arising from not furnishing plaintiff its proportion of cars for shipment of coal under the rules established by the appellee, and for violation of its rules re-

INDEX.

	Page
I. Statement of the Case and Questions Involved	1
Statement of Case	1
Questions Involved	9
II. Specifications of Error	9
Argument	12
A. Should Appeal have been taken directly to the Supreme Court or to the Circuit Court of Appeals	12
Procedure in the Court below	12
Plaintiff's Whole Case before Court and not Question of Jurisdiction only	16
Question of Jurisdiction to be Certified directly to Supreme Court, must involve Jurisdiction as Federal Court	18
Other Questions than that of Jurisdiction were involved in Writ of Error and should have been submitted to Circuit Court of Appeals	29
B. Was There Original Jurisdiction in the Circuit Court.	37
Abilene Cotton Oil Company and Pitcairn Coal Company cases do not sustain Position of Appellee	37
(a). Abilene Cotton Oil Co. case discussed	38
(b). Pitcairn Coal Co. case discussed	42
Decision of Supreme Court in above cases applies only to Attacks on Present Existing Regulations, Practices or Rates	53
The Commission Having Determined that any certain Practice or Regulation is Improper, and Having Established a Proper Regulation, It is not Necessary that the Same Finding Should Be Repeated on Every Subsequent Complaint	58
If Application to Commission Necessary, Court should Suspend Proceedings to Permit Such Application to be made	61

INDEX (Continued).

Page

C. The Question of Car Distribution 63

Method of Calculation of Cars Due It Adopted by Appellant was Proper in Law 64

Railroad Company's Method of Distribution Subversive of Purpose of the Act 78

Attempted Distinction between Cars for "Commercial" and Cars for "Fuel" Coal..... 80

D. The Question of Damages 87

Appellant's Measure of Damages Represents Actual Damage Suffered and Is Proper Basis of Damages 87

No Set-off for Excess of Cars Furnished in other months can Be Claimed by Appellee..... 88

TABLE OF CASES.

Page

Allen, et al., v. Strong, 17 C. C. A., 124 Fed. 273 33
American Banana Co. vs. United Fruit Co., 160 Fed. 184; 166 Fed. 261; 213 U. S. 347 29
Bache v. Hunt, 193 U. S. 523 26
Baltimore & Ohio R. R. Co. v. U. S. of America, ex rel. Pitcairn Coal Co., et al., 215 U. S., 481 ..... 7, 28, 37, 42, 49, 57, 64
Blythe Co. v. Blythe, 172 U. S. 644 25
Blythe v. Hinckley, 173 U. S. 501, 506 ..... 24, 27
Board of Trade v. Hammond Elevator Co., 198 U. S., 424 28
Chappell v. U. S., 160 U. S., 499 30
Coler v. Grainger County, 74 Fed. 16 32
Crabtree, et al., v. Madden, 54 Fed. 426 33
Haring-Wilson Coal Co. v. Wheeling & L. E. R. Co., decided Dec. 22, 1906 70
Independent Refiner's Assn. v. Western N. Y. & Pennsylvania Co., et al., 5 I. C. C. Rep. 415, 433 83
Indian Mtn. &c. Coal Co. vs. Ice Co., 134 N. C. 574 67
Interstate Commerce Commission v. Chicago & Alton R. R. Co., 215 U. S., 479 51
Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S., 452 ..... 45, 51, 62, 67
In the Matter of Discriminations in Coal & Oil, Report of Interstate Commerce Commission to Congress, of Jan. 25, 1907. 81
Iowa Railroad Commissioners, 1878 - 20 69
Judiciary Act of March 3rd, 1891, Chap. 517, 26 Stat. 826, Secs. 5, 6 ..... 12, 18, 20
Judson on Interstate Commerce, Secs. 189, 191, 193 72
Loewe v. Lawlor, 208 U. S., 274 35
" " " 148 Fed. 924 35
" " " 142 Fed. 216 35
" " " 130 Fed. 633 35
Logan Coal Co. v. Pa. R. R. Co., 154 Fed. 497 ..... 66, 74
Louisville Trust Co. v. Comingor, 184 U. S. 18 29
Louisville Trust Co. v. Knott, 191 U. S., 225 ..... 18, 19, 27, 29
Majestic Coal & Coke Co. v. Illinois Central R. R. Co., 162 Fed. 810. 70
Manufacturing Co. v. Barber, 9 C. C. A., 79, 60 Fed. 465 33
McLish v. Roff, 141 U. S., 661 ..... 31, 34
Murray v. Chicago & N. W. Rwy. Co., 62 Fed. 24, s. c., 92 Fed. 868. 27

TABLE OF CASES (Continued).

Page

Northern Pacific Rwy. Co. v. Pacific Coast Lumber Mfrs.' Assn., et al., 165 Fed. Rep. 1 62

Peck v. Jenness, 7 How, 612, 624 22

Rail & River Coal Co. v. Baltimore & Ohio R. R. Co., 14 I. C. C. Rep. 86 59

Railroad Commission of Ohio v. Hocking Valley Rwy. Co., 12 I. C. Rep., 398 .....50, 58, 66, 72

Railroad Co. v. Meyers, 10 C. C. A., 485, 62 Fed. 371..... 33

Railroad Co. v. Pratt, 22 Wall. 123 68

Reliable &c. Co. v. Stahl, 105 Fed. 663 17

Rice v. Louisville & N. R. Co., 1 I. C. C. Rep., 503, 547..... 68, 77

Rice v. Western N. Y. & Pa. R. R. Co., 4 Int. Com. Rep., 131, 149. 70

Riddle, Dean & Co. v. N. Y., L. E. & W. R. R. Co., 1 I. C. C. Rep. 594 69

Riddle, Dean & Co. v. The Pittsburgh & L. E. R. R. Co., 1 I. C. C. Rep., 374, 386 67

Royal Coal & Coke Co. v. Southern Rwy. Co., 13 I. C. Rep., 440... 59

Schweer v. Brown, 195 U. S., 171 29

Scofield, et al., v. The Lake Shore & M. S. Rwy. Co., 2 I. C. C. Rep., 90, 114 83

Smith v. McKay, 161 U. S., 355, 357 ..... 22, 23, 24, 25

Southern Rwy. Co. v. Tift, 206 U. S., 428 62

State v. C., N. O. &c. Rwy. Co., 47 Ohio St. 130..... 84

Steamship Jefferson, 215 U. S. 130 28

Taylor v. Carryl, 20 How. 583, 596 22

Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S., 426 .....27, 28, 37, 38, 54, 57

Traer v. Illinois Central R. R. Co., 13 I. C. Rep., 451..... 66

Traer, Rec'r v. Chicago & Alton R. R. Co., 13 I. C. Rep., 451... 50, 59

United States ex rel. Coffman v. Norfolk & Western Rwy. Co., et al., 109 Fed. Rep. 831..... 67, 69, 83

United States ex rel. County of Iron v. Severens, 18 C. C. A., 314; 71 Fed. 768 33

United States ex rel. Kingwood Coal Co. v. W. Va. Nor. R. R. Co., et al., 125 Fed. 252 67

United States v. Larkin, 208 U. S., 333 29

Wirgman v. Parsons, 126 Fed. 449 16

Worcester Excursion Car Co. v. Penna. R. R. Co., 3 I. C. C. Rep., 577, 587 73

World's Columbian Exposition Case, 18 U. S. App. 42..... 23

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BRIEF ON BEHALF OF THE APPELLANT.

I. STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

This was an action brought March 3rd, 1908, by the Morrisdale Coal Company, appellant, against the Pennsylvania Railroad Company, appellee, for damages arising from not furnishing plaintiff its proportion of cars for shipment of coal under the rules established by the appellee, and for violation of its rules re-

sulting in unjust discrimination against the appellant in the distribution of coal cars by the appellee on the Tyrone Division of the Pennsylvania Railroad in what is known as the Clearfield Region.

The Pennsylvania Railroad Company, during the period covered by the complaint, made up a daily distribution sheet, showing the number of cars to which the region in question was entitled, the number of cars actually in the region, the rating in cars, figured on a percentage basis, to which each mine in the region was entitled, and the number of cars received by each mine.

The rule as to car distribution at that time in force on the Pennsylvania Railroad in the Clearfield Region was that each mine was entitled to its percentage rating, based upon relative capacity to produce coal, of "the equipment for distribution" daily in the region (Rec. pp. 14, 15). This rule of car distribution was uniformly violated by the Pennsylvania Railroad Company with respect to the appellant in the following manner. Instead of taking the percentage to which each mine was entitled according to its rated capacity as a percentage of the entire number of cars in the region, or the entire amount of "equipment for distribution" the Pennsylvania Railroad Company arbitrarily deducted from the equipment in the region, (1st) individual cars, or cars which were owned by certain of the mines in the region and upon which the Pennsylvania Railroad Company paid the mines a certain wheelage or rental, at the rate of six mills per ton per mile (Rec. p. 57); (2nd) cars which were used for the purpose of transporting fuel coal for the use of the Pennsylvania Railroad Company; and (3rd) cars which were sent into the field by other railroad companies for the transportation of fuel coal for the use

of such other railroad companies, which cars were known as "foreign fuel cars". The cars remaining in the region after these deductions had been made were daily distributed, and upon the number of these cars only was the percentage rating of the mine applied, and such percentage of cars was furnished to the mines respectively (Rec. p. 58).

The rule as to car distribution above set forth continued in force until January 1, 1906, when the appellee changed entirely its rules upon that subject.

During the times when there was no car shortage in the region, no complaint was made by the appellant, those of course being the times when the other operators in the region did not desire the cars, or when there was an ample supply on the part of the railroad company for all purposes, and when the price of coal in the market was exceedingly low (Record, pp. 13, 31). But during periods of car shortage in the region, when the demand for coal in the market was active and the requirement for cars was heavy and the supply insufficient, the appellant showed that its mines received a deficiency of cars, according to the percentage rating given to it by the Pennsylvania Railroad Company, applying to "the same equipment for distribution" and available for shipment of coal, in accordance with the rule established by the appellee. On page 27 of the Record is a detailed statement showing the total number of cars in the region, the rating of the appellant's mines, the number of cars it received, and the deficiency on its percentage during the months of car shortage; also the rating of the Berwind-White Coal Mining Company, the number of cars received by it, and the excess of cars received by the said Company over its percentage during the months of car shortage, it appearing invariably, with

but one trifling exception, that at these periods of car shortage when the demand for cars was great, the Pennsylvania Railroad Company violated its rule as to car distribution, and the appellant was discriminated against by not receiving its full quota of cars under the rule established by the Pennsylvania Railroad Company; the Berwind-White Coal Mining Company receiving numbers of cars largely in excess of the percentage to which it was entitled, thus showing a discrimination in favor of the Berwind-White Coal Mining Company as against the appellant company.

Mr. Wigton, President of the appellant company, testified that the effect of the failure to furnish the cars to which his company was entitled, or the irregular furnishing of them, sometimes in excess and sometimes in deficient numbers, resulted in his company being unable to fulfill the obligations which it had entered into for the delivery of coal, and as a result he was forced to go into the market and purchase coal to fulfill his contracts on the best terms and at the best prices that he could. The insufficient and irregular supply of cars further prevents the regular working of the colliery (Record, p. 15). And in addition to this, much expense was incurred by keeping the colliery in constant operation, the pumps being kept going constantly in order to keep water out of the mines; and all the expenses that applied to the preservation of the mine and the conduct thereof had to continue while the mine was in idleness, thus increasing the cost *per ton* of such coal when it was produced (Record, p. 15). He further testified (Record, p. 15) that he informed the Pennsylvania Railroad Company's officials of the fact that his Company had contracts to fill, that cars were required for that purpose, and that during the entire period of time covered by the claim for damages

in this case he was repeatedly and constantly informing the officials of the appellee company of this situation with respect to the necessity of his having cars in order to fill his contracts, and making demand upon the appellee company for the cars in question.

It was in evidence that the Morrisdale Coal Company, at all times, was ready and able to ship all the coal which it would have been entitled to ship had the cars which its percentage rating entitled it to under the established rule, been furnished to it, and that when any excess of cars was given to it, at times when there was no demand for cars and when other operators in the district did not want them, the appellant company regularly loaded these excess cars and shipped them to market, showing that the capacity of the mine was even greater than the rating given to it by the Pennsylvania Railroad Company (Record, p. 14).

It further appeared in the testimony (Record, p. 37), that the appellant company had contracts for delivery in interstate shipments which required regular daily, weekly and monthly deliveries, and consequently it became absolutely essential for the proper conduct of the appellant's business that there should be a regular daily supply of cars, and not a supply which was uncertain and irregular.

Appellant's damage was then estimated as follows: On the sheet offered in evidence (Record, p. 27), the shortage of cars reduced to terms of wooden cars, which held, according to the railroad company's calculations, twenty-five (25) tons, was figured out in tons. Some slight differences in calculation between the appellant and the appellee from the appellee's distribution sheets were discovered during the trial, which modified the appellant's estimate, which modification

was allowed for by agreement in the final verdict; but for the principle involved, the figures contained on page 27 and the other sheets offered by the appellant can be assumed to be correct.

This tonnage showed various deficiencies. In the month of June, 1902, there was a deficiency of 3075 tons which the appellant should have shipped, and which amount, if it had received the cars, it could have mined and shipped; but, having no cars and being unable to ship this tonnage, and being required to fill contracts which it had entered into, the appellant was compelled to go into the market and buy coal for the purpose of filling this deficiency caused by the railroad company's violation of its established rule, and default. The average price at which the appellant company purchased coal for the purpose of filling these contracts, during the month of June, 1902, was $1.93 per ton. Had it been able to ship these 3075 tons at its own mines and in the cars which it is alleged the railroad company should have furnished to the appellant, the cost of mining this coal, the evidence showed, would have been 97 cents a ton, including royalty; or, in other words, on this 3075 tons the appellant company, by reason of the railroad company's default, was compelled to pay ninety-six (96) cents a ton (the difference between $1.93 and 97c.) in excess of what it would have cost it to mine the coal and put it on the railroad company's cars, had those cars been furnished, according to the rule established for distribution thereof. This ninety-six cents, the damage per ton, multiplied by the number of tons, 3075, gave the damage for the month of June, 1902. See Record, pp. 34, 35, 36, where is found a statement of the damages in each month for which damages are claimed figured on this basis. In addition thereto, the

extra expense of mining the coal actually mined and shipped, as compared with the expense of mining it had the proper proportion of cars been furnished to appellant, was figured out as five cents (5c.) per ton. The basis of this calculation is found on pp. 31, 32, 33 of the Record. This sum is also found in the statement on p. 35, and is added to the damages. The claim for damages on this basis, after correcting the error found in the figures, amounted, with interest, to Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

The questions thus raised were tried before a jury and a special verdict was rendered on November 17, 1909, for the above amount (Record, pp. 10, 11). The plaintiff moved the Court, on November 29th, 1909, to enter judgment upon the verdict. Pending a decision upon this motion for judgment, the Supreme Court of the United States handed down an opinion on January 10, 1910, in the case of Baltimore & Ohio Railroad Co. vs. United States of America, ex rel. Pitcairn Coal Company et al. (215 U. S. 481). Upon the strength of this opinion the appellee filed, on January 31, 1910, a motion to dismiss the action for want of jurisdiction. The plaintiff's motion for judgment on the verdict, as well as the motion to dismiss for want of jurisdiction, was argued and the latter motion was sustained in an opinion by McPherson, J., who entered judgment dismissing the case (Record, p. 83).

An appeal was taken from this judgment to the Circuit Court of Appeals for the Third Circuit and a Writ of Error was allowed February 10, 1910, (Record, p. 102). Assignments of Error were filed by the appellant to the action of the court dismissing the cause for want of jurisdiction; to the action of the court in not entering judgment in favor of the

plaintiff for Sixty-seven thousand one hundred fifty-six dollars and nine cents ($67,156.09); to the action of the court in not affirming the plaintiff's points, which referred, (1) to the failure of the Railroad Company to observe and enforce its rule as to the distribution of cars; and (2) to the proper measure of damages to be applied for the alleged discrimination.

The case was argued in the Circuit Court of Appeals *in extenso* on its merits; and the court had prepared an opinion (Record, p. 105), but before filing it the appellee presented a petition for the dismissal of the writ of error, on the ground that under the provisions of Sections 5 and 6 of the Act Establishing the Circuit Court of Appeals, that Court had no appellate jurisdiction of the case (Record, p. 112). The question thus raised was then argued separately and the motion to dismiss the writ of error was denied. (See Opinion, Record, p. 112). A judgment was entered by the Circuit Court of Appeals, filed January 10, 1911, reading as follows (Record, p. 124):

> "This cause, being heard upon the record and argument of counsel, both upon the merits and upon the jurisdiction of the Circuit Court to entertain the action, and the record presenting for necessary consideration the proper construction of the Act to Regulate Commerce and the claim of jurisdiction in the Circuit Court not resting solely upon diversity of citizenship of the parties, and this Court being of opinion that the sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force necessarily forbid the exercise of jurisdiction in this case by the Circuit Court, it is adjudged and ordered that the judgment of the Circuit Court, dismissing the case, be affirmed and that the defendant recover of the plaintiff its costs in this behalf expended."

From this judgment the present appeal is taken. The questions accordingly raised are as follows:

1. Preliminarily, the question whether or not this appeal should have been prosecuted directly from the Circuit Court to the Supreme Court, or whether it was properly taken first to the Circuit Court of Appeals and thence to this Court.

2. The question whether, under the Act to Regulate Commerce, original jurisdiction in this case existed in the United States Circuit Court.

3. The question whether the failure of the appellee to enforce its rule as to car distribution was such as to give an undue or unreasonable preference or advantage to any particular company, firm, corporation or locality, and to subject the appellant to any undue or unreasonable prejudice or disadvantage, under the terms of the Act to Regulate Commerce.

4. Whether the measure of damages adopted by the appellant was the proper method by which the damages should be estimated, provided the unlawful discrimination existed, and whether this Court should direct that judgment be entered on the verdict aforesaid.

II. SPECIFICATIONS OF ERROR.

The following are the specifications of error filed (Record, pp. 127, 128):

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

II.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the Circuit Court had jurisdiction of this cause.

III.

That the said Circuit Court of Appeals erred in failing to direct the Circuit Court to enter judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

IV.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and in failing to direct that in periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to its use the number of cars which its percentage of all such available cars would award to it in accordance with the system of distribution in effect.

V.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and the action of the Circuit Court in failing to direct that if the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant. The damages should be estimated as follows: The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region. This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts for shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

ARGUMENT.

A. On the question as to whether or not the Appeal from the Circuit Court should have been taken direct to the Supreme Court or to the Circuit Court of Appeals.

It was argued by the appellee in the Circuit Court of Appeals that the proper procedure on the part of the appellant upon the adverse decision of the Circuit Court, was to appeal direct to the Supreme Court, under the provisions of Sections 5 and 6 of the Act establishing the Circuit Court of Appeals. These sections are as follows (Record, p. 112):

> "SECTION 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. * * * * *
>
> SECTION 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

Before taking up a discussion of the authorities upon this point it would be well to lay before the Court the actual procedure which occurred in the court below. It is as follows:

Issue having been joined by the pleadings, a jury was empaneled on the 16th day of June, 1909, which, after hearing the evidence both for the plaintiff and defendant, returned their verdict as follows (Record p. 10):

"We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit 2, and is

Principal	$51,640.60
Int.	15,515.49
Total	$67,156.09

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

It will be observed that by this verdict the jury found "The plaintiff's claim is correct and is contained in its exhibit 2 and is (total) $67,156.09."

But the jury also in their verdict provided that

> "If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover."

And also

> "If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

At the trial, the plaintiff submitted to the Court points of charge on the law as shown on page 79, and the defendant offered points of charge on the law, as shown on page 80, and the Court said (Record, p. 79):

> "The points of the plaintiff and defendant respectively are not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant."

Thereupon the plaintiff, on the 29th day of November, 1909, filed a motion for judgment in its behalf for the sum of Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09), and two months thereafter, on the 31st day of January, 1910, the defendant moved the Court to dismiss the action for want of jurisdiction to entertain the same (Record, p. 82). Upon the hearing on these two motions, the Court rendered an opinion holding (Record, p. 84):

> (1) "There is no 'rule of law' that requires the aggregate of available cars always and everywhere to be divided ratably in times of shortage."

and this was the conclusion reached by the Court after stating:

> "It will at once be observed that the suit requires a Court and jury to decide whether the defendant's method of distribution offended against the Act. The questions are, (1) whether this method gave a preference to any particular person, company, firm or corporation, or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable."

and thereupon the Court held that the propositions of law asked for by plaintiff (appellant) and which the Court had failed to approve (granting plaintiff an exception) were not correct and that there was no "rule of law" requiring available cars always and everywhere to be divided ratably in times of shortage.

(2) The Court further held that the primary jurisdiction to award damages which "may have been caused by a preferential practice in distributing coal cars in case of shortage" was in the Interstate Commerce Commission, and "that the circuit court has not the primary power to award such damages", and thereupon directed that the defendant's motion to dismiss the suit for want of jurisdiction be granted, and awarded the plaintiff an exception thereto.

On the 10th day of February, 1910, judgment was entered in the cause in favor of the defendant.

Thereupon a writ of error was sued out in the Circuit Court of Appeals and the errors assigned are to be found on pp. 100 and 107 of the Record, and it will be seen that in addition to assigning for error that the lower Court had sustained the motion of defendant to dismiss the cause for want of jurisdiction, the plaintiff assigned as its third ground of error "That the learned Court erred in not entering judgment in favor of the plaintiff in the sum of Sixty-seven thousand one hundred and fifty-six dollars and nine cents ($67,156.09)", in accordance with the special verdict of the jury (Record, p. 10). In other words, this assignment of error brought up every question in the case, and not alone the question of jurisdiction, and if the Circuit Court of Appeals should have found that the Circuit Court had jurisdiction, then the Circuit Court of Appeals must have further determined whether or not the plaintiff was entitled to a judgment on the special verdict and for what amount.

The fourth and fifth assignments of error brought up to the Circuit Court of Appeals for consideration the law of the case covering the right to damages and the amount thereof following the provision in the special verdict authorizing the Court to enter judgment for

such amount as the Court might determine the plaintiff was entitled to under the law, and these assignments of error follow the exception which was allowed by the Circuit Court, at the bottom of page 119 of the Record, and at the top of page 120, and the finding of the Court as to there being "no rule of law" governing *pro rata* car distribution "in times of shortage".

I.

As we understood the case presented to the Circuit Court of Appeals, not only the question of jurisdiction was involved, but the plaintiff's whole case was brought up for determination in that Court.

Counsel for both plaintiff and defendant so understood the case when it was first argued in the Circuit Court of Appeals before the question of the propriety of the appeal had been raised, for the briefs in that Court in behalf of both plaintiff in error and defendant in error, show that there was presented to the Court for consideration not only the question of jurisdiction of the Circuit Court but also whether upon the whole case the plaintiff was entitled to a judgment, if the Circuit Court of Appeals should determine that the Circuit Court had jurisdiction. It was only after months had elapsed, that the defendant in error filed its motion in the Circuit Court of Appeals for dismissal of the Writ of Error in this case on the ground that "Under the statutes of the United States regulating writs of error to the Circuit Court" the Writ of Error taken to the Circuit Court of Appeals in this case was properly issuable only out of the Supreme Court of the United States.

In the case of Wirgman v. Parsons, 126 Fed. 449, in the Circuit Court of Appeals for the Fourth Circuit, a somewhat similar condition arose.

There was a question of jurisdiction involved in the decision of the Circuit Court, and a Writ of Error to the Circuit Court of Appeals, and upon the argument of the case, upon appeal, the question of jurisdiction was discussed, as well as other points, by both parties to the appeal. The Circuit Court of Appeals found that the Circuit Court had jurisdiction and thereupon a petition for re-hearing was filed, setting up that the Writ of Error in the case should have been sued out in the Supreme Court of the United States instead of the Circuit Court of Appeals, and that, therefore, the Circuit Court of Appeals had no jurisdiction. In commenting upon this belated position, the Circuit Court of Appeals (Norris, J.) said:

> "Nothing was said in their briefs here, nor in the oral argument before the Court, challenging in any way the jurisdiction of this Court to hear their appeal. On the contrary, the judgment and decision of this Court was earnestly invoked by both sides. It thus appears that the whole case came into this Court, and that it had taken jurisdiction of the whole case. That being so, it is not competent for counsel by their voluntary action to attempt to limit the jurisdiction of the Court. When the case was decided in the Court below, the appellant had his option to take the case to the Supreme Court of the United States on the question of jurisdiction alone, or he could have done as he has done—take the whole case to this court."

citing numerous cases and further saying:

> "In Reliable, etc., Co. v. Stahl, 105 Fed. 663, a case carried to the Circuit Court of Appeals on bill of exceptions, one of which went to the jurisdiction of the court below and others to the merits, when the case got up into the Circuit Court of Appeals, it was found that for lack of a proper appeal, or for non-compliance with the rules, the exceptions to the merits could not be heard. It

was held that this did not deprive the Circuit Court of Appeals of jurisdiction to hear the case.

Our conclusion is that, the appellants having elected to appeal the whole case to this court and the whole case having come into this court for adjudication, we had the choice either to certify the question of jurisdiction to the Supreme Court, or ourselves to decide the question. 'Of course the power to certify assumes the power to decide.' U. S. v. John, *supra.*"

So that we submit that this case having been argued in the Circuit Court of Appeals upon all the questions involved and which were before the Circuit Court, including the question of whether the damages found by the jury were properly recoverable under the law; that the position of defendant in error that the single question of the Court's jurisdiction was involved in the writ of error taken to the Circuit Court of Appeals, was certainly belated and entitled to no more consideration than was absolutely required.

As we understand the rule "the question of jurisdiction which the Judiciary Act of March 3d, 1891," Chapter 517—26 Stat. 826 (Sec. 5), paragraph 1,—"permits to be certified directly to this (Supreme) Court must be one involving the jurisdiction of the Circuit Court *as a Federal Court and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing of concurrent jurisdiction as between themselves.*" Louisville Trust Co. v. Knott, 191, U. S., 225.

The case now before the Court is an action of trespass founded upon a statute passed by Congress and therefore the general jurisdiction of the Circuit Court of the United States would attach thereto, both as to the form of action and as to the subject matter, the claim for damages having arisen under an Act of Con-

gress, but the Circuit Court held that in order that the action be maintained it was necessary to show that the Interstate Commerce Commission had primarily passed upon the questions of car distribution which were attacked by the plaintiff, and that the plaintiff having failed to show that the Interstate Commerce Commission had primarily passed upon these questions and found them to involve discrimination under the Act to Regulate Commerce, that the Circuit Court of the United States was without jurisdiction to pass upon the questions involved in the case. This want of jurisdiction of the Court, as found by the Judge of the Circuit Court, was not a want of jurisdiction of the Circuit Court *as a Federal court,* but the finding of the Circuit Court would apply equally to any Court, State or Federal, to wit: that in order to maintain the case it was necessary to show, as part of the plaintiff's evidence, that the Interstate Commerce Commission had passed upon the question of car distribution attacked by the plaintiff. If these questions of car distribution had not applied to interstate commerce, then the Federal court would have had no jurisdiction of the subject matter as a Federal court, but where the Court, as constituted, has general jurisdiction of the subject matter, to wit: an action of trespass arising under an Act of Congress, it cannot be said that the finding of the Circuit Court was that the Court had not jurisdiction *as a Federal court because* it held that it was necessary to show as part of the plaintiff's evidence that the Interstate Commerce Commission had primarily passed upon the questions of car distribution involved in the case.

Our position on this point is clearly sustained by the case of *Louisville Trust Company v. Knott,* 191 U.

S. 225. That case arose out of conflicting claims by the Circuit Court of the United States for the Western District of Kentucky and the Circuit Court of Jefferson County, Kentucky, as to the right to administer the property of the Evening Post Company, a Kentucky corporation. The Federal Court had possession, by its receiver, of the property of the Company and declined to surrender it to the Louisville Trust Company, the receiver appointed by the State court, and dismissed an intervening petition filed by the latter Company, and, from the order dismissing this petition, an appeal was prosecuted and "granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this (Circuit Court), or the said Jefferson Circuit Court, Chancery Branch, First Division, has prior jurisdiction," it being stated in the order that the single question upon which the cause was decided was as to whether the United States Circuit Court had jurisdiction over the said trust estate, and whether such jurisdiction was prior and exclusive of that of the State court, and the appeal was prosecuted to the Supreme Court of the United States.

The Supreme Court held that this was not such a question of jurisdiction as authorized a direct appeal to the Supreme Court of the United States from the Circuit Court, under Section 5 of the Judiciary Act of March 3d, 1891.

The Court, speaking through Mr. Justice Harlan (p. 232) said:

> "By the Judiciary Act of March 3d, 1891, c. 517, 26 Stat. 826, an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a Circuit Court to this Court in certain specified cases, among which is 'any

case in which the jurisdiction of the court is in issue'; and 'in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.' Sec. 5. In all cases, other than those specified in section five of that act, the Circuit Court of Appeals is given appellate jurisdiction. Sec. 6.

The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue'. There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that Court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the Circuit Court did in that respect was questioned by the Trust Company, on behalf of the state court, solely upon the ground that the taking by the Federal court of possession of the property and assets of the Post Company—after the state court by the institution of the Haldeman suit had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of Federal or state origin, that 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court'; that, as the object of the suit in the state court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the Federal court, whereby the state court was prevented from giving any effectual relief to the parties before it, was inconsistent with the re-

lations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject matter. *Peck v. Jenness*, 7 How. 612,624; *Taylor v. Carryl*, 20 How. 583, 596.

In all this there was nothing involving the jurisdiction of the Circuit Court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.

We think this question was substantially so determined in *Smith v. McKay*, 161 U. S. 355, 357. That was a suit in equity for an injunction to restrain the defendants from using certain patented machines until they had fully paid the fees they had agreed to pay to the patentee. The defendants moved to dismiss the bill upon the ground that there was a plain, adequate and complete remedy at law—thus raising only a question of equity jurisdiction. The motion to dismiss was denied. After final decree for the plaintiff, the case was brought directly to this court by appeal, and it was assigned for error that the Circuit Court erred in not dismissing the suit for want of jurisdiction. The position of the appellee in that case was that only questions of Federal jurisdiction could be brought directly here; and that if the Circuit Court had jurisdiction of the parties and of the matters in dispute, the fact that the remedy of the plaintiff was at law, rather than in equity, raised no question of jurisdiction within the meaning of the fifth section of the Judiciary Act of March 3d, 1901, under which the appeal was taken.

The Court observed that the question had never been directly decided by it, but that it arose

in the *World's Columbian Exposition case, 18 U. S. App. 42,* in which the Circuit Court sitting in equity granted an injunction to prevent the opening of the Exposition Grounds to the public on Sunday. That case was taken by appeal to the Circuit Court of Appeals for the Seventh Circuit, and a motion was there made to dismiss the appeal. Chief Justice Fuller, speaking for that Court said:

> 'The Appellees have submitted a motion to dismiss the appeal upon the grounds that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the seventh section of the Judiciary Act of March 3d, 1891. We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act.'

Referring to these observations of the Chief Justice, this Court in *Smith v. McKay,* said:

> 'We regard this as a sound exposition of the law, and applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellant's contention in this respect would require us to entertain an ap-

> peal from the Circuit Court in every case in equity, in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law. When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals.' 161 U. S. 355, 358.

In principle, the judgment in *Smith v. McKay* embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this Court from a Circuit Court.

The question again arose in *Blythe v. Hinckley,* 173 U. S. 501, 506, where this court said:

> 'Appeals or writs of error may be taken directly from the Circuit Courts to this Court in cases in which the jurisdiction of those courts is in issue, that is their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this Court. The Circuit Court held that the remedy was at law

and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. *Smith v. McKay*, 161 U. S. 355; *Blythe Co. v. Blythe*, 172 U. S. 644. The Circuit Court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts. If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect.' "

According to the construction put upon the Interstate Commerce Act by the Circuit Court, the Interstate Commerce Commission is primarily authorized to consider and pass upon questions of car distribution "and to award reparation for such damages as may have been caused by a preferential practice in distributing coal cars in case of shortage", and the Court further held that it had not "the primary power to award such damages"; and the Court held that this construction of the Act to Regulate Commerce was necessary in order to prevent confusion between the administrative duties of the Interstate Commerce Commission and the orders or judgments of the Circuit Court of the United States or any other Court. The Court did not deny the jurisdiction of the Circuit Court of the United States in this case as a Federal court, but denied that any court, Federal or State, could pass upon questions of car dis-

tribution, and award damages therefor, until the Interstate Commerce Commission had primarily passed upon such questions of car distribution. It was more in the nature of a finding that the plaintiff's evidence did not show that the Interstate Commerce Commission had primarily passed upon the matters involved in the case, than a finding that the Circuit Court of the United States, as a Federal court, was without jurisdiction.

In the case of *Bache vs. Hunt*, 193 U. S. 523, it appears that Hunt, Receiver, filed a petition in the Circuit Court of the United States for the Northern District of Ohio in a foreclosure suit, of Continental Trust Co., &c., vs. Toledo &c. Railroad Co. and Jules S. Bache, et als., asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, and stock of the railroad company in the hands of the Farmers' Loan and Trust Company, to be reimbursed for amounts paid by him or his predecessor, as Receiver, in the extinguishment of prior claims which the bonds and stock had been deposited to secure. Bache, who was a citizen of New York, was ordered to demur, plead or answer the petition, and appeared specially and filed a plea to the jurisdiction of the Court as to the subject matter, because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition, in which suit a Receiver had been appointed of the securities forming the subject of Hunt's petition, and that the Court had no jurisdiction of his person because of the insufficiency of the method of service of the order. The plea of Bache was overruled, and he declining to plead further, the petition was taken as confessed as to him, and a decree was entered, subsequently, that Hunt or his successor in right, was entitled out of the securities, to be reimbursed in the

amounts which had been paid by him as Receiver in respect to the prior claims.

From this decree an appeal was taken directly to the Supreme Court of the United States, and that Court, in delivering its opinion by Mr. Chief Justice Fuller, said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court. *Louisville Trust Company v. Knott*, 191 U. S. 225; *Blythe v. Hinckley*, 173 U. S. 501.
>
> Tested by this rule our jurisdiction fails, and the appeal must be dismissed."

There is no doubt that the plaintiff could have maintained an action for failure to deliver cars to it in a State court of Pennsylvania if it could maintain its action in any court. *Texas and Pac. Ry. vs. Abilene Cotton Oil Co.*, 204 U. S. 426; *Murray vs. Chicago & N. W. Rwy. Co.* (62 Fed. 24, supp. 42-43, s. c. 92 Fed. 868). It is equally clear that the opinion of the learned Circuit Court applies just as well to the jurisdiction of the State Courts as to the Circuit Courts of the United States in cases of this kind and holds that no judicial tribunal, State or Federal, can entertain an action for failure to furnish plaintiff its proper proportion of cars for use in interstate commerce until the fairness of the car distribution actually under discussion, has

been primarily passed upon by the Interstate Commerce Commission. The learned Court below took the position that the plaintiff's rights were "not subject to be judicially enforced" by any court, *State or Federal,* "at least until" the Interstate Commerce Commission, "clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions" (Record, p. 91) quoting from B. & O. R. R. Co. vs. U. S. ex rel. Pitcairn Coal Co., 215 U. S. 481.

In the case of Board of Trade vs. Hammond Elevator Co., 198 U. S. 424, the Supreme Court in referring to Section five of the Act of March 3d, 1891, says, at page 432:

> "The proper construction of this section has been the subject of frequent consideration in this Court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the Federal court, as a Federal court, is put in issue, *and that questions of jurisdiction applicable to the State courts, as well as to the Federal courts, are not within its scope.*" (Italics ours.)

In the Abilene Cotton Oil Co. case (204 U. S. 426) the Court held that a State Court of Texas did not have jurisdiction of an action for damages on the allegation that the plaintiff had been charged an unreasonable rate, for the reason that the Interstate Commerce Commission had exclusive original jurisdiction, and on the authority of that case (R. p. 96) the Circuit Court in the present case held that it did not have jurisdiction, which ruling was equally applicable to any Court, State or Federal.

In the case of the Steamship Jefferson, 215 U. S. 130, the Court said:

> "It is settled that under the Act of 1891, in order to entitle to a direct appeal from the decree

of a District or Circuit Court dismissing a cause for want of jurisdiction, the decree which is sought to be reviewed must have involved the jurisdiction of the Court below as a Federal Court". Louisville Trust Co. vs. Cominger, 184 U. S. 18; Schweer vs. Brown, 195 U. S. 171."

The reasons of the lower Court and its holding of lack of jurisdiction were equally applicable to actions in all courts, State and Federal, and therefore we submit, as said by the Supreme Court in *Louisville Trust Company vs. Knott*, (*supra*), it was never intended under Section five of the Act of March 3d, 1891, "that any such question should be the basis of a direct appeal" to the Supreme Court of the United States from a Circuit Court.

See, also,

U. S. vs. Larkin, 208 U. S. 333.
American Banana Co. vs. United Fruit Co., 160 Fed. 184, 166 Fed. 261, 213 U. S. 347.

II.

By the Judiciary Act of March 3d, 1891, Section 5, it is provided:

"Section 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

First—In cases in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision", etc.

By Section 6 of the Act, the Circuit Court of Appeals is given appellate jurisdiction "to review by appeal or by

writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in'' Section 5 of the Act, above set forth. And the question now presented to this Court is whether the writ of error first sued out in this case should have taken the case to the Supreme Court direct or whether it was permissible to have the same heard by the Circuit Court of Appeals, and the true guide to the determination of this question is, whether the sole question involved upon the writ of error was one of jurisdiction of the Circuit Court or whether there were other questions involved in the writ of error, and if it should be found that there were other questions involved, as we most earnestly contend, then the Circuit Court of Appeals was the proper forum in which to determine the questions upon the first writ of error.

According to our view of this case—and the defendant in error also entertained the same view at the argument before the Circuit Court of Appeals, (which Court took the same view), there was involved in this case before that Court, not only the question of jurisdiction of the Circuit Court, but the question of whether, if the Circuit Court of Appeals should find that the Circuit Court had jurisdiction, it should direct the Circuit Court to enter judgment for the plaintiff for Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09), or some part thereof, and that the Circuit Court erred in failing to give the plaintiff a judgment for the above amount, and also erred in failing to find the law as prayed for by the plaintiff and to which action of the Court an exception was granted to the plaintiff.

In speaking of Section five of the Judiciary Act of March 3d, 1891, the Supreme Court in the case of *Chappell v. U. S.*, 160 U. S. 499, at page 507 (Mr. Justice Grey) said:

"In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction under this clause of the statute."

By referring to the petition for writ of error (Record, p. 102) it will be seen that the petition and the allowance thereof by the Court was in the "usual and general form" setting forth the verdict on behalf of the plaintiff, the dismissal of the case for want of jurisdiction and "that the petitioners represent that in such judgment and *the proceedings had prior thereto in this cause,* certain errors were, in the opinion of your petitioner, committed in the said Court to the prejudice of your said petitioners, *all of which will more fully and in detail appear with the assignments of error, which are filed with this petition*", and by referring to the assignments of error it will be shown that the questions presented to the Circuit Court involved not only the question of jurisdiction, but the failure of the Court to enter judgment for the plaintiff and the failure of the Court to find the law of the case in accordance with the plaintiff's views as presented in its points of charge, to which an exception was allowed by the Circuit Court, as will appear in the Record (p. 81).

In discussing a similar question in the case of *McLish v. Roff*, 141 U. S. 661, the Supreme Court (Mr. Justice Lamar) said (p. 668):

"The true purpose of the act, as gathered from its context, is that the writ of error, or the

appeal, may be taken only after final judgment, except in the cases specified in Section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court."

In Coler v. Grainger County, 74 Fed. 16 (C. C. A. Sixth Circuit, before Taft and Lurton, Circuit Judges, and Hammond, J.) it appeared that a bill was filed by Coler against Grainger County, to enforce a written contract of subscription for $75,000 of the par value of the stock of a railroad company. Subsequently, an amended bill was filed and to the amended bill, a demurrer was entered, one of the grounds of the demurrer being that the Court was without jurisdiction. The Court sustained the demurrer on the ground that it was without jurisdiction of the subject matter of the amended bill, and thereupon an appeal was taken and error assigned to the decree of the Court that it was without jurisdiction, and other grounds of error were specified. In delivering the opinion of the Court, Taft, Circuit Judge, said (p. 20):

"It is first objected that this court has no jurisdiction of the appeal here taken, because it presents only the question of the jurisdiction of the court below. The argument is that by Section 5 of the Court of Appeals Act, where the question is alone of jurisdiction, it is to be certified to the Supreme Court, and by Section 6 of the same act the Court of Appeals is given jurisdiction only in those cases of appeal and error not provided for in Section 5. It has been held that, where the only question raised upon the record before the court of appeals is a question of jurisdiction of the

court below, the appeal must be dismissed, because the Court of Appeals is not vested with jurisdiction to consider that question only. *Manufacturing Co. v. Barber*, 9 C. C. A. 79; 60 Fed. 465; *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 371; *Allen v. Strong*, 17 C. C. A. 124, 70 Fed. 273; *U. S. v. Severens*, 18 C. C. A. 314, 71 Fed. 768. The motion to dismiss the appeal, however, cannot be sustained in the case at bar, because the record does present questions other than that of the jurisdiction of the Circuit Court. This is quite evident from the assignments of error. It is true that the court below dismissed the bill for want of jurisdiction, but this court could not dispose of the case, should it disagree with the court below on the question of jurisdiction, without proceeding to consider the other grounds stated in the demurrer to the amended bill, which questioned the equity of the bill, and the validity of the county's subscription for stock. In such a case it is quite clear that an appeal lies to this court, and that *ex necessitate*, this court must consider the question of jurisdiction in order that it may proceed to decide the other questions raised upon the merits. *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 371."

In the case of *Crabtree et al. v. Madden*, 54 Fed. 426 (C. C. A., Eighth Circuit, before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge), an action was brought in the United States Court in the Indian Territory by the Creek Tribe of Indians and Crabtree, to collect a tax which the Acts of Congress awarded to the Indian tribes. To the complaint, a demurrer was interposed:

(First) That the complaint did not state facts sufficient to constitute a cause of action;

(Second) That the Court had no jurisdiction of the subject matter or the parties; and

(Third) That the plaintiff had no legal capacity to sue.

The demurrer was sustained and upon a writ of error to the Circuit Court of Appeals to reverse the judgment sustaining the demurrer, the Court said (Sanborn, Circuit Judge) p. 427:

> "The contention of counsel for defendant is that the jurisdiction of the court below is the only question in issue in this case; that the Supreme Court has exclusive jurisdiction to hear and determine that question under Section 5, and hence this court has no jurisdiction to consider it. It is proper to notice that this is a writ of error to review a final judgment; that it brings up the entire case; and that, if this court was of the opinion that the court below had jurisdiction of the subject-matter and the parties, there would remain for determination the question whether or not the complaint states facts sufficient to constitute a cause of action; so that it can hardly be said that the question as to the jurisdiction of the court below is the only question here in issue. But if it was, and the question was clearly presented whether or not this court has jurisdiction to determine that question when a writ of error or appeal from a final judgment or decree, which brings up the whole case, presents to this court the single question of the jurisdiction of the court below, the decision of the Supreme Court has settled that question adversely to the contention of the defendant. In McLish v. Roff, 141 U. S. 661, 668, 12 Sup. Ct. Rep. 118,—a case from the United States Court in the Indian Territory,—in which all the provisions of the act creating this court that are material in this case were carefully considered, that court declared the right and privilege of the defeated party upon the entry of a final judgment in the court below to be as follows:
>
> 'When that judgment is rendered, the party against whom it is rendered must elect

whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question to this court.'

The result is that when the party against whom a final judgment has been rendered in a District or Circuit Court of the United States elects to take his writ of error to a Circuit Court of Appeals upon the whole case, that court has jurisdiction to determine it, whether the question of the jurisdiction of the court below is the sole question or but one of many questions in issue under the writ. The plaintiffs in error have made their election to take their writ of error to this court upon the whole case, and the motion to dismiss the writ is denied."

In the case of *Loewe vs. Lawlor,* 208 U. S. 274, the questions presented for decision are stated briefly by Mr. Chief Justice Fuller, as follows:

"This was an action brought in the Circuit Court for the District of Connecticut under Sec. 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, claiming threefold damages for injuries inflicted on plaintiffs by a combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman Act, and this rendered it unnecessary to pass upon any other questions in the case; and upon plaintiffs declining to amend their complaint the court dismissed it with costs. 148 Fed. Rep. 924; and see 142 Fed. Rep. 216; 130 Fed. Rep. 633.

The case was then carried by writ of error to the Circuit Court of Appeals for the Second Cir-

cuit, and that Court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: 'Upon this state of facts can plaintiffs maintain an action against defendants under Section 7 of the Anti-Trust Act of July 2, 1890?'

After the case on certificate had been docketed here plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted and the whole record and cause being thus brought before this court, it devolved upon the court, under Section 6 of the Judiciary Act of 1891, to 'decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal'."

At page 296, the Chief Justice further says:

"But the objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said, that the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruction is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

We think none of these objections are tenable. and that they are disposed of by previous decisions of this court."

So it will be seen that exactly the same question was involved in the case of *Loewe vs. Lawlor,* as is involved in the case now before the Court, one arising under the Act of Congress known as the "Act to Regulate Commerce", and the other under what is known

as the "Anti-Trust Act", and in both cases the lower Court held that the Court did not have jurisdiction under the Act of Congress, to entertain the plaintiffs' action under the facts shown, and in both cases a writ of error took the case directly to the Circuit Court of Appeals. In the case of *Loewe vs. Lawlor,* that Court certified the question of jurisdiction to the Supreme Court. In the case now before the Court, counsel for plaintiff in error, and defendant in error, argued both the question of jurisdiction and the other questions involved in the whole case before the Circuit Court of Appeals, to which it had already been submitted for decision.

B. On the question whether there was original jurisdiction in the Circuit Court.

I.

The appellee asserts, and the Court below decided that the Circuit Court had no jurisdiction in this case unless the manner of car distribution which was carried out by the appellee, and charged as being discriminatory, was first attacked before the Interstate Commerce Commission, and the questions involved in this case passed upon by that Commission in the first instance. In support of this position they cited the case of Baltimore & Ohio Railroad Co., appellant, vs. United States of America, ex rel. Pitcairn Coal Company, appellee, 215 U. S. 481; and the case of Texas & Pacific Rwy. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Our view, however, is that the Pitcairn Coal Company case and the Abilene Cotton Oil Company case, not only do not sustain the position taken by the ap-

pellee here, but sustain the appellant in the position that the Circuit Court had jurisdiction in this case.

Second, even if it was the duty of the appellant to first have the Interstate Commerce Commission find that the system of car distribution on the Pennsylvania Railroad, at the time covered by the Complaint in this case, was unjust and unreasonable or unjustly discriminatory or prejudicial, that the Interstate Commerce Commission had already ruled to this very effect as to the arbitrary assignment of individual cars, foreign railway fuel cars and the company's own fuel cars; and that therefore further application to the Commission was unnecessary under the decisions above set forth.

1. It is desirable in the very outset to understand exactly what was decided by the Court in the two cases above mentioned.

TEXAS & PACIFIC RAILWAY CO. vs. ABILENE COTTON OIL COMPANY, 204 United States 426.

In this case the Oil Company sued in the State courts of Texas to recover $1,951.83, claiming that on shipments of carloads of cotton seed oil over the Texas & Pacific Railway, the carrier had exacted, over the protest of the oil company, payment of an unjust and unreasonable rate. It further appeared that the rate charged the plaintiff was the one fixed in the rate schedules which the company had established, filed, published and posted, as required by Sec. 6 of the Act to Regulate Commerce, and that rate *was, at the time the suit was brought, the only established legal rate,* under the Act to Regulate Commerce, which the carrier could charge for the transportation referred to. The Supreme Court of the United States held that the

State court of Texas did not have jurisdiction, on the ground that, under the Act to Regulate Commerce, exclusive jurisdiction to determine the reasonableness of a rate *then on file* with the Interstate Commerce Commission, under Section 6 of the Act, was vested in the Interstate Commerce Commission, and that the courts could not entertain a suit based upon a charge that such legal rate, as filed, was unjust and unreasonable, until the Interstate Commerce Commission had passed upon that question.

And the Court gives its reasons for such conclusion as follows, pp. 439-441:

> "When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist *in the future from violating the act*, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint

made by a shipper without previous action by the Commission, *would give rise to a change of the schedule rate* and thus cause the new rate resulting from the action of the court to be applicable *in future* as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is *wholly inconsistent with* the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provisions endowing the administrative tribunal which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule,

conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

It will be observed of course that in the Abilene Cotton Oil case, the question was *as to the reasonableness of a then effective legal rate in use at the time and applicable to the future,* and the effect of the Court holding that the rate was unreasonable would be to require the carrier to charge thereafter a different rate from that filed with the Interstate Commerce Commission.

In discussing Section 9 of the Act to Regulate Commerce, the Supreme Court says (pp. 441-442):

"Nor is there merit in the contention that Section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon the courts primarily to relieve from the duty of enforcing the established rate by finding that the same *as to a particular person or corporation* was so unreasonable as to justify an award of damages. *True it is that the general terms of the section when taken alone might sanction such a conclusion,* but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction con-

tended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the *ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.*" (Italics ours.)

We would therefore submit to the Court, that, under the Abilene Cotton Oil case, the courts have jurisdiction under Section 9, wherever the exercise of the jurisdiction by the courts cannot produce conflict or confusion between the administrative duties of the Commission under the Act to Regulate Commerce, and the judgment of the Court under Section 9 of the Act to Regulate Commerce.

PITCAIRN COAL COMPANY CASE.
(215 U. S. 481.)

This case was begun by petition under Section 23 of the Act to Regulate Commerce, praying for a man-

damus to require the Baltimore & Ohio Railroad Company to desist from the enforcement of the rules then established by the Baltimore & Ohio Railroad Company for the distribution of its coal cars, on the ground that the rules then in effect produced a discrimination against the plaintiff and an undue preference as to other persons. The rules then in force upon the Baltimore & Ohio Railroad as to car distribution were as follows:

> "Whenever the car supply is sufficient all orders are filled. Whenever in any district the car supply is insufficient to fill all orders, cars are distributed on a percentage basis after certain arbitrary assignments have been made, as follows:
>
> 1. B. & O. Railroad cars placed at mines for B. & O. fuel coal.
>
> 2. New mines are allotted an arbitrary number of cars daily or weekly for development. In cases where the inspection shows a marked increase in the capacity of certain mines, and it is not practicable to change the percentage of the whole district, proper arbitraries are applied pending a general revision.
>
> 3. Cars of foreign railroads assigned by them to their own fuel trade.
>
> 4. Cars of individual companies placed at mines owned by such companies, and cars owned by individual consumers placed at mines for their coal.
>
> There are also certain exceptions of a local character, as follows:
>
> 1. Curtis Bay premium. Whenever a shipper on the B. & O. Railroad handles cars at Curtis Bay promptly in any one month, he is allowed in the succeeding month a premium of fifty per cent. of the number of cars so handled, in addition to his regular percentage. This in lieu of an assignment of cars to the Curtis Bay trade.
>
> 2. At certain points noted on the percentage

sheets, an arbitrary number of cars is assigned to mines on fire.

3. At certain mines in the immediate vicinity of industries, empty cars intended for loading at such industries are first sent into the mines for loading coal for such industries.

4. Where annual contracts are placed for foreign railroad fuel coal with mines on the B. & O., arrangements are made that if the foreign railroads' cars are furnished for this fuel coal, the B. & O. will allow the mines shipping the coal a number of B. & O. cars equal to the foreign cars furnished.

5. When mines are connected with foreign railroads as well as with the B. & O., their rating is reduced fifty per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats."

In the Pitcairn case the Supreme Court held that the exercise of jurisdiction by the Court to require by mandamus the institution of new rules for car distribution for the future, was inconsistent with the administrative duties of the Interstate Commerce Commission under Section 15 of the Act to Regulate Commerce, and, therefore, the Commission having the power, under Section 15, to determine and prescribe the practice to be thereafter observed by the railroad company with regard to the rule for the distribution of coal cars, that a proceeding could not be sustained in the courts until the Commission had passed upon the reasonableness of the method of distribution which the railroad company then had in effect.

In the case now before the Court, it is to be noted that the attack in this instance is not made upon the rule of car distribution laid down by the Pennsylvania Railroad Company but upon the continuous violation of it by the Pennsylvania Railroad Company in the Clearfield Region, to the prejudice of the appellant.

The complaint of the Morrisdale Coal Company in this case covers the period from March, 1902, to December, 1905, inclusive and grows out of its failure, upon demand, to receive from the Pennsylvania Railroad Company sufficient coal cars for its requirements during that period. The duty of the railway carrier under the Act to Regulate Commerce during the period aforesaid, is stated by the Supreme Court of the United States in the case of *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S. 452, at page 494, as follows:

> "It may not be doubted that the equipment of a railway company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the Governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one."

The statement of claim in this case was based upon this principle of law as follows (Record, p. 6):

> "During the time mentioned herein, and now, it was and is unlawful for the said Pennsylvania Railroad Company to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it was the duty of the said railroad company, during the time hereinafter mentioned, and now, to offer all reasonable, proper, sufficient and equal facilities to all shippers of coal over its said railroad or line, and to make a fair and proportinate distribu-

tion of its car supply and other vehicles, and all instrumentalities and facilities for shipment and carriage, irrespective of ownership or contract embraced or implied for the use thereof, for the accomodation of all shippers alike in the said district hereinbefore described. *And it was also the duty of the said railroad company to distribute all cars in service on its road fairly and proportionately to the said coal mines on, and to shippers of coal over its said railroad.*"

The statement of claim then proceeds to set forth the method of the rating of the capacity of mines and collieries in the Clearfield Region, upon which the Pennsylvania Railroad Company proposed to base, in times of car shortage, a pro rata and equal distribution of cars in the proportion of the capacity of each mine, showing that the plaintiff during said period under said plan was entitled to receive a certain proportionate part "*of the cars in said district*" upon daily allotment thereof.

The statement of claim then proceeds as follows (Record, p. 7):

> "Nevertheless plaintiff avers that the defendant, in violation of its duty to the plaintiff to see that no undue or unreasonable preference or advantage was given to any person, company, firm, corporation or locality in the said district, or to subject any particular person, company, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage, failed and refused* * * to deliver to the plaintiff, on reasonable demand being made therefor, by the plaintiff, the plaintiff's due proportion or daily allotment of cars which * * * the defendant should have sent to the plaintiff's mines for the purpose of plaintiff's shipments of coal, as before set forth."

It may not be doubted that at common law as well

as under the Act to Regulate Commerce, the carrier, if offered freight, (1) must furnish the required transportation, (2) or excuse itself by saying that the notice was too short or uncertain, (3) or by saying that its equipment was sufficient to meet all reasonable expectations of demands upon it, accompanying this by a tender of a proportionate share of the available cars and facilities in service. This last (3) is the answer of the Pennsylvania Railroad Company, involved in this case, upon demand for coal cars, in times of shortage, and it established a rule providing for such proportionate distribution of coal cars.

The plaintiff produced Frank H. Wigton, who testified as to the rule of distribution of coal cars in time of shortage *established by the Pennsylvania Railroad Company in the Clearfield Region,* during the time covered by this complaint, as follows (Record, p. 13):

"Q. And for the periods covered by your claim, are only periods when there is a car shortage in the field?

A. That is correct.

Q. During the time there is not a car shortage there is no complaint covered by this proceeding?

A. There is not.

Q. What do you mean by car shortage?

A. Only there are insufficient cars to meet the requirements or demands of the several operators in the field.

Q. In the territory?

A. Yes.

Q. Will you explain to the jury when there are not enough cars for filling the requirements of the shippers in the district or region, how are the cars divided that are available for shipment by the Pennsylvania Railroad Company?

A. The Railroad Company establish a capacity for each colliery in the district.

Q. They do that with their own engineers or men?

A. They do that entirely of their own initiative by themselves. Having established this rating, the aggregate of that rating is called the capacity of the region.

Q. You mean the capacity of shipping coal?

A. The capacity to mine and ship coal, and whatever proportion your rating bears to the 100 percentage of aggregate is your proportion of the car supply which they furnish, and it is divided in that way.

Q. And that is worked out to a percentage basis, is it?

A. It is.

Q. *And to each of the mines in the territory is assigned a percentage of the equipment for distribution?*

A. *There is.*"

The rule, therefore, established by the Pennsylvania Railroad Company was that each colliery in the Clearfield Region was entitled to an ascertained percentage "*of the equipment for distribution*". This is shown by plaintiff's Exhibit A (Record, p. 27), where one column of the statement shows the rated percentage of the Berwind-White Coal Mining Company, and another column that of the Morrisdale Coal Company during the period covered by this complaint, *as established by the Pennsylvania Railroad Company*, and daily applicable, according to the testimony of Mr. Wigton, to "*the equipment for distribution*".

The above being the rule established by the Pennsylvania Railroad Company for car distribution, it appears, according to the plaintiff's claim, that the Pennsylvania Railroad Company violated this rule by not applying the percentage distribution to "the equipment for distribution" during the period covered by

the complaint, but taking all of the cars in the field daily and which should have been distributed pro rata, it deducted from such aggregate all individual or privately owned cars, all cars for use in the transportation of fuel coal for the Pennsylvania Railroad Company, and all cars of foreign railroad companies used for the transportation of fuel coal for such companies (Record, pp. 63-4), and the balance of the equipment in the field for distribution, after this arbitrary violation of the rule requiring a percentage assignment "of the equipment for distribution", was daily divided upon the percentages established in accordance with the rule of the Pennsylvania Railroad Company.

This case, therefore, arises not upon an attack upon the rule of car distribution as unreasonable or unfair, nor upon any effort of the plaintiff to require a present and future fair distribution of cars, as in the case of *Pitcairn Coal Co. vs. Baltimore & Ohio Railroad Co.*, but the plaintiff's grievance lay in the fact that after having established a rule for daily percentage distribution of cars during periods of shortage, applicable to "the equipment for distribution", the Pennsylvania Railroad Company, so far as the plaintiff's rights are concerned, violated this rule by unlawfully excluding from "the equipment for distribution", certain cars and giving them as a preference to the Berwind-White cars which it was entitled to under the very rule established by the Pennsylvania Railroad Company.

In the Pitcairn Coal Company case the rules of car distribution above set forth were carried out by the Baltimore and Ohio Railroad Company, and the complaint was that the rules were unfair and a mandamus was asked to require enforcement of other rules for the future. In this case no complaint is made as to

the rule of pro rata distribution, but complaint is made that the rule of the appellee, as stated by Mr. Wigton, was violated, in not applying it to the cars covered by the rule. This is an action to enforce the rule as established.

The statement of claim in this case was filed on the 17th day of July, 1908. Prior thereto the Interstate Commerce Commission had held that private or individual cars and foreign railway fuel cars, should, in the distribution of cars, be counted as a part of the equipment for distribution against the company to which such cars were delivered:

> Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C. Rep. 398.

and, therefore, such cars were a part of "the equipment for distribution" on the percentage basis established by the rule of the Pennsylvania Railroad Company, and the failure of the Pennsylvania Railroad Company to count such cars upon its percentage basis of distribution, was a violation, so far as the Morrisdale Coal Company was concerned, of the rule established by the Railroad Company, for the daily pro rata distribution of its cars.

Prior to the filing of the statement of claim in this case, the Interstate Commerce Commission also held that cars of a carrier upon its own line for transportation of its own necessary fuel supply, should be counted against the mines receiving the same under daily percentage distribution, if the mines receiving such cars were engaged in the shipping also of commercial coal.

> Traer vs. Chicago & Alton Ry. Co., 13 I. C. C. Rep. 451.

This view was approved by the Supreme Court of

the United States in the case of *Interstate Commerce Commission vs. Chicago & Alton Ry. Co.*, 215 U. S. 479.

And see also,

Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S. 452.

Therefore the cases decided by the Interstate Commerce Commission prior to the filing of the statement of claim in this case, are conclusive that the arbitrary elimination of private or individual cars, fuel cars and foreign railway fuel cars, by the Pennsylvania Railroad Company in its daily pro rata distribution under the rule established by it for the purpose of providing "a just and equal distribution" of cars, was a violation of the rule established by the Pennsylvania Railroad Company, so far as the Morrisdale Coal Company was concerned, and this was the cause of action asserted by the Morrisdale Coal Company.

What good was to be accomplished, or what confusion avoided by again having the Commission determine that "the equipment for distribution" under the rule of Pennsylvania Railroad Company above set forth, covered individual cars, foreign fuel cars and the company's fuel cars?

The case presented by this record was not one in which was involved the reasonableness or unreasonableness, the fairness or unfairness, of a rule of distribution of cars established by the Pennsylvania Railroad Company, for its rule provided that "the equipment for distribution" should be daily pro rated to the mines in accordance with the percentages established by the Pennsylvania Railroad Company, and the complaint here is that, so far as the Morrisdale Coal Company was concerned, this rule was violated by the Pennsylvania Railroad Company, during the period covered by this complaint, by arbitrarily assigning a

part of the cars which should have been counted in the distribution, during the period covered by this complaint, to the Berwind-White Coal Mining Company (See Record, pp. 63-64).

The complaint, therefore, in this case is not covered by the decision of this court in the Pitcairn Coal Company case, for there a charge was made that the then present rules of distribution of cars were unjust and unreasonable and discriminatory, and the court was asked by mandamus to prescribe a reasonable and fair method of distribution for the future, and the court held that the question there presented as to the fairness of the established rules, must primarily be passed upon by the Interstate Commerce Commission, but here no attack is made upon the rule for distribution as established by the Pennsylvania Railroad Company, but it is charged that in the past and during the period covered by the complaint, the Pennsylvania Railroad Company had violated, so far as the rights of plaintiff were concerned, the rule of distribution established by it.

Nor is the complaint here covered by the Abilene Cotton Oil Company case, where the Court held that the lower court had no jurisdiction to entertain a complaint charging that a rate duly filed with the Interstate Commerce Commission, was unjust and unreasonable until the complainant had first applied to the Interstate Commerce Commission, and on the ground that if the Court assumed jurisdiction of such a complaint, that confusion would be brought about and the purposes of the Act destroyed in that the administrative duties of the Interstate Commerce Commission would be interfered with. If in that case, however, the complaint had been that the carrier company had established and filed with the Interstate Commerce Com-

mission a rate of $1.00 per ton on coal, and that during a period prior the complaint, the carrier had charged the complaining shipper $1.50 per ton on coal, or fifty cents above the tariff rate, thereby violating its tariff, we submit that the Abilene Cotton Oil Company case does not go to the extent of holding that the Court would not have had jurisdiction to entertain the claim for the fifty cents charged in excess of the tariff rate during a period prior to the filing of the complaint.

II.

There is another view of this question of jurisdiction which clearly sustains the position of the appellant even if it be assumed that the appellant's attitude originally was an attack upon the fairness or reasonableness of a rule, regulation or practice of the Pennsylvania Railroad Company by a claim for damages therefor.

The decision of this Court on the question of jurisdiction as discussed in the Pitcairn Coal Company case and the Abilene Cotton Oil Company case, obviously refers only to attacks made on present, existing regulations or practices or present, existing rates.

Section 9 of the Act to Regulate Commerce, under which this action is brought, is as follows:

> "Sec. 9. That any person or persons *claiming to be damaged by any common carrier subject to the provisions of this act* may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may *be liable under the provisions of this act,* in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each

case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

It is argued by the appellee here that the decision of the United States Supreme Court in the Abilene Cotton Company case, 204 U. S. 426, and in the Pitcairn case (*supra*), determine that the United States Circuit Court had no jurisdiction to entertain an action for damages on the part of the appellant, for failure to give to the appellant its fair proportion of cars, until the appellant has proceeded before the Interstate Commerce Commission and secured from that tribunal a ruling to the effect that the "regulations and practices" of the appellee with respect to such car distribution constitute "undue and unreasonable prejudice or disadvantage", and are "unjust and unreasonable, or unjustly discriminatory or prejudicial" or otherwise in violation of the Act to Regulate Commerce; and that in the absence of such finding by the Interstate Commerce Commission, the Circuit Court had no jurisdiction under the authority of the two cases above mentioned.

We reply to this position of the appellee, first, that under the circumstances of this case, *the Interstate*

Commerce Commission would only have concurrent jurisdiction with the courts to entertain the complaint as to the regulations and practices as to car distribution which were in effect on the Pennsylvania Railroad at the time covered by the complaint in this case, and that one of the forums to which the appellant could originally go and seek relief was the Circuit Court of the United States, under Section 9 of the Act to Regulate Commerce. The confusion which would arise, as illlustrated in the Pitcairn Coal Co. case, could only exist, when concurrent jurisdiction is assumed by the Commission and the Circuit Courts in the consideration of *present* regulations and practices of the carrier which do now and will in future create discrimination. We hereinafter discuss this fully.

It will be seen that the reason upon which the Court reached the conclusion that the Commission and the Courts could not have concurrent jurisdiction of the question of the reasonableness of the rates published and filed with the Commission, as required by Section 6 of the Act to Regulate Commerce, is that such rates might be found reasonable by the Court and unreasonable by the Commission, and *vice versa*, and that this would produce a conflict between the Courts and the Commission, and the enforcement of the Act to Regulate Commerce would be impossible. And therefore, taking the Act as a whole, the Supreme Court held, as will be hereafter seen, that the right to sue in the courts under Section 9 of the Act to Regulate Commerce was limited to only such cases *as would not produce confusion and conflict as between the conclusions reached by the Commission and the Courts.*

We conclude that the principle has been established that Section 9 permits suit to be brought for damages thereunder wherever the conclusion

reached by the Court does not operate as to the future regulations and practices to be observed by the carrier, and where there can be no conflict between the conclusion which may be reached even in the exercise of concurrent jurisdiction by the Commission and the Courts under the Act to Regulate Commerce.

This view is further borne out by the opinion of the Supreme Court in the Abilene Cotton Oil Co. case (*supra*) p. 445):

> "In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, *its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all.* And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before

its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing the equality which the statute commands." (Italics ours.)

It will be observed that in both the Pitcairn Coal Co. case and the Abilene Cotton Oil Co. case, above set forth, the jurisdiction of the courts was denied on the ground that the exercise of the jurisdiction by the courts required prescribing a rule of action *for the future,* and that this course would necessarily result in conflict and confusion, as between the courts and the Commission, to which the Act to Regulate Commerce had primarily committed the duty of enforcing reasonable and just rates, rules and practices to be thereafter observed by the carrier.

Coming now to the case before this Court, it will be observed that the practices complained of and which damaged the appellant, were in effect on the Pennsylvania Railroad from 1902 to January 1, 1906; and the appellant's claim covers a period from 1902 to the latter part of 1905.

On the first of January, 1906, the appellee, the Pennsylvania Railroad Company, annulled the practices which had theretofore been in effect and which are complained of in this suit, and established a different rule for the distribution of cars. (See evidence of Wigton, Record, p. 57.) And our position in this case is, that the rule or practice complained of having been annulled on the first of January, 1906, that the exercise of jurisdiction by the court in passing upon the fairness of the past rule or practice could not produce confusion, nor could the Commission be in any way embarrassed by the Circuit Court of the United States exer-

cising concurrent jurisdiction with the Interstate Commerce Commission, under Section 9 of the Act to Regulate Commerce, to pass upon those rules or practices, and awarding damages on account of the discriminatory character of them.

The fact that our construction of the Act to Regulate Commerce permits the exercise of concurrent jurisdiction by the Commission and the Courts, is no argument against such construction, if that construction defines the true meaning of the Act. Nor is it any argument against the proposition which we advance, to say that different conclusions might be reached by the Commission and the Courts upon cases identical in their facts. This has been true of all litigation, especially in those cases where there is concurrent jurisdiction in the State and Federal courts; similar cases have been decided in different ways by different courts continually, and will continue to be so decided. Where, however, as would be the case under our construction of the Act, the Federal courts have jurisdiction concurrent with the Commission, to determine the reasonableness or unreasonableness of past rules and regulations of traffic, which are now obsolete, and assess damages thereon, precedent, which has always governed the courts, would tend to preserve uniformity. In any event, no confusion could arise destructive of the provisions of the Act to Regulate Commerce, such as would arise should the Federal courts determine in the first instance the reasonableness of present or future regulations and practices, and the final adjudication of the case would come to this court, whether begun originally before the Commission or in the Circuit Court.

III.

In the case of Railroad Commission of Ohio vs. Hocking Valley R. R. Co. (12 I. C. Rep. 398), the

same questions, as to distribution of cars, involved in the present case, were decided by the Interstate Commerce Commission. The decision of that case was rendered on July 11, 1907, after suit had been begun by the Pitcairn Coal Company vs. the Baltimore & Ohio Railroad Company, but before suit had been begun in the present case. The question then before the Commission was the same question of car distribution concerning individual cars, foreign railway fuel cars and railway fuel cars, and the Commission then decided:

> "That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars."

This decision was afterwards affirmed by the Commission in Royal Coal & Coke Company vs. Southern Railway Co., 13 I. C. Rep. 440; Traer, Receiver vs. Chicago & Alton R. R. Co., 13 I. C. Rep. 451; and Rail & River Coal Co. vs. Baltimore & Ohio R. R. Co., 14 I. C. C. Rep. 86. This rule is in substance the one contended for by the appellant here and is the same

as the one originally established, as shown by the testimony of F. H. Wigton in this case (Record, p. 12), and violated by the Pennsylvania Railroad, as shown in this case, there being no evidence to show that the private or individual cars were in such quantity that the placing of them at the mines to which they belonged would have given to the mines receiving the same a greater number of cars than such mines were entitled to under their percentages, during the periods of car shortage. It would be doing a vain thing to ask the Commission to pass upon a similar question before invoking the jurisdiction of the Circuit Court. It cannot be contended that the rulings of the United States Supreme Court are to the effect that where the Commission has once passed upon a question, and established a proper regulation, that all subsequent complaints involving identically the same condition of affairs, and the construction of the same regulations must first be presented to the Commission, in order that the Commission may again reiterate its rulings. Having once established a rule, it is submitted that all plaintiffs thereafter are fully justified in proceeding on the strength of that rule in the Circuit Court of the United States.

Claim is made here that the ruling of the Interstate Commerce Commission requires the delivery to a coal company of all its individual cars and specially consigned cars, even though the delivery of such cars to such company would result in its receiving more cars than it would be entitled to under its percentage. And it is further argued that the appellant having failed to show that it could have received the number of cars that it was entitled to under its percentage, if the individual cars and specially consigned cars had

been given to the persons entitled to the same, that the appellant had failed in its proof and judgment must go for the appellee.

When we show by the distribution sheets of the appellee, *the number of cars on the road available for shipment of coal,* and the number thereof to which the appellant would have been entitled under its percentage, then the appellant has proven its case; and if the number of cars to which the appellant was entitled is to be reduced by reason of any exception on account of the particular character of certain cars on the road available for carrying coal, then the burden is upon the appellee to show the number and character of such cars in order to exclude them from the general rule as to distribution. The appellee has utterly failed in this case to sustain this burden. It is true that it was shown in the evidence that some of the cars were individual cars and some were also specially consigned cars, but this does not establish that the appellant would not have received its full number of cars under its percentage, even if such cars had been given to the persons entitled thereto, as claimed by the appellee.

If the appellee relies upon the fact that a certain number of cars were of special character and therefore to be taken out of the general distribution, we submit, that the burden is upon it to show the number of such cars; and the proof being insufficient to establish the number of such cars, the appellant cannot be defeated on this ground.

IV.

Even if this Court should determine that an application to the Interstate Commerce Commission is necessary, it is submitted that the proper practice in the present case would be for the Court to suspend

further proceedings herein, to permit the appellant to make an application to the Interstate Commerce Commission for a ruling upon the reasonableness of the methods of distribution of the appellee carrier which the appellant now seeks to attack. Such a proceeding was permitted in the case of Southern Railway Company vs. Tift, 206 U. S. 428, a case which was decided after the decision in the Abilene Cotton Oil Company's case, and was a bill filed to restrain the railway company from maintaining certain rates. Temporary injunction was at first granted, but was subsequently dissolved, and the complainants were permitted to make application to the Interstate Commerce Commission for the purpose of determining the reasonableness of the rates attacked. The finding of the Commission was had, and the action of the Commission incorporated into the case before the Circuit Court. A situation comparatively similar arose in the case of the Northern Pacific Railway Co. v. The Pacific Coast Lumber Mfg. Assn., 165 Fed. Rep. 1.

This method of procedure will appeal the more strongly to the equities of the present situation, when it is realized that the Statute of Limitations has now run for all of the appellant's damage, and should the present suit be dismissed and the appellant relegated to a determination before the Interstate Commerce Commission followed by a suit for damages on such determination, the Statute will unquestionably be interposed as a bar despite the fact that under the decisions of the Supreme Court in the case of Interstate Commerce Commission vs. Illinois Central Railway Co., 215 U. S. 452, the discrimination by the carrier is obvious, and the appellant's damages, the result of such discrimination, equally so.

C. On the distribution of the cars.

The question between the appellant and appellee on this point is, that the appellant contends that all cars in the region available for shipment of coal, whether individual, railroad fuel, or commercial cars, shall be taken as the number upon which the percentage to which the appellant is entitled, and shall be estimated in the daily distribution, in other words the rule of the appellee that each mine's percentage should be applied to "the equipment for distribution" (Record, p. 12) meant, and could under the law only mean, all cars daily in the District for transportation of coal and for loading by mine owners.

The appellee contends that no discrimination results when the total number of cars to be counted in such distribution, is limited to cars in the region, after deducting the individual cars, the fuel cars, and the foreign railway fuel cars.

This action was brought under the Act of Congress of February 4, 1887, entitled "AN ACT TO REGULATE COMMERCE", and its amendments and supplements, and charges the appellee company with a violation of Section 3 of that Act, which reads as follows:

> "SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is conceded by the appellant that if individual cars, fuel cars and foreign railway fuel cars are not to

be counted in the distribution against the person receiving the same, there has been no undue or unreasonable discrimination against it (Record, p. 64); consequently the first question for determination is whether or not the method adopted by the appellant in calculating the amount of cars due it by the railroad company was proper in law. This whole question was thoroughly and exhaustively examined by the Circuit Court of Appeals of the Fourth Circuit in the case of United States of America, ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio Railroad Company, 165 Fed. Rep. 113, and the question was squarely decided in favor of the appellant's contention.

On the question of individual cars the court speaks as follows:

> "The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we cannot consider, inasmuch as the statute was not enacted for the purpose of promoting the interests of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.
>
> "It is made the duty of the carrier to move the product of the shipper, and in doing so, if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief afforded by Section 23 of the act. If, as in this instance, a carrier by contractual arrangement, operates individ-

ual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which is left entirely with the carrier; but, while such is the case, it is equally true that the carrier cannot, by any such arrangement, by indirection, accomplish that which is prohibited by the statute.

"We do not think it was the purpose of the framers of the act to undertake to secure the same development of each mine, but rather to place the various shippers upon an equal footing in so far as shipping facilities were concerned. To any one who is acquainted with the coal business it will be readily seen that, under any system of car distribution which places a particular mine owner in a position where such owner is unable to make prompt delivery of the product of his mine, such failure on the part of the shipper to receive his proportionate share of cars must necessarily result in placing him at a great disadvantage and in a position where it would be practically impossible to operate his mine, and all this to the very great injury of the consumer, who, under such conditions, is from necessity compelled to purchase from the favored shipper, at higher prices, or, at least, with suppressed competition, because the favored shipper can alone, under such conditions,

guarantee and secure to him steady and uniform shipments of fuel absolutely necessary, in most cases, for the successful conduct of his business."

On the question of fuel cars the Court, in the same case, expressed itself as follows (page 126):

> "The court below, in dealing with the question relative to the fuel cars of the Baltimore & Ohio Railroad Company and foreign railroad cars, held that they were not to be charged against the companies using them as a part of the percentage to which they were entitled under the arrangement agreed upon, to which reference has heretofore been made. A careful consideration of this phase of the question forces us to the conclusion that the fuel cars of the carrier, its regular equipment of cars, the cars of other roads sent in for fuel, and the private or individual cars of the mining operators should be placed absolutely upon the same basis in so far as the distribution of car service by the carrier is concerned. We fail to understand upon what theory the carrier can relieve itself from a charge of discrimination, when it is shown that such cars are arbitrarily allotted to certain mines, and not charged to such mines as a part of the percentage to which they are entitled under the arrangement by which it is undertaken to secure a fair distribution of car service among shippers on its line."

The Court then quotes with approval the cases of The Railroad Commission of Ohio vs. Hocking Valley R. R. Co., 12 I. C. Rep. 398; Logan Coal Company vs. Pennsylvania Railroad Company, 154 Fed. Rep. 497, which we have subsequently quoted in this brief.

The rule laid down by the Interstate Commerce Commission in the Hocking Valley case was affirmed by the Commission in the case of Traer vs. Illinois Central R. R. Co., 13 I. C. Rep. 451. The Railroad Com-

pany appealed from the ruling of the Commission to the United States Circuit Court, which modified the Commission's ruling in part. From this an appeal was taken by the Commission to the United States Supreme Court, which reversed the ruling of the Circuit Court and sustained the regulation of the Commission. Interstate Commerce Commission vs. Illinois Central R. R. Co. (215 U. S. 452).

This case merely follows the trend of decisions as laid down in all previous cases. The rule upon the subject is well stated in Riddle, Dean & Company vs. Pittsburgh & L. E. R. Company, 1 Int. Com. Comm., Rep. 374, 386, as follows:

> "If, in that crisis, it could not furnish sufficient cars to all the shippers along its line for the amount of their freight, then it was its duty to have done what is shown by the evidence it did, and this was to fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments over its line upon a basis that was relatively and substantially just."

The rule was expressly recognized in U. S. vs. W. Va. Nor. R. R. Co., 125 Fed. 252; U. S. ex. rel. Coffman, vs. Norfolk & Western Railway Co., 109 Fed. Rep. 831. So also in Indian Mtn. &c. Coal Co. vs. Ice Co., 134 N. C. 574, it was said (page 583):

> "In the latter case (referring to the Coffman case, 109 Fed. 831, which had just been cited with approval), it was held that while the capacity of a shipper of coal may be greater than his allotment of cars, yet when such is also the case with any other operator similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand without unjust discrimination, among all the operators, including the shipper in question."

The argument of the Pennsylvania Railroad Company (appellee) is that when short of cars it prorates what it calls the commercial cars upon its line; but these cars are not the entire number of cars upon its line, but a number left after arbitrarily taking out of the distribution a large part of its equipment, to wit, individual fuel cars and foreign railway fuel cars. The extent of this reduction is shown by the evidence (Record, page 77) in which the calculation offered by the carrier company showed that in four years from 1902 to 1905, inclusive, out of 310,085 cars, placed in the region, less than one-third, or 98,652 cars, were what are called by the appellee commercial cars, or Pennsylvania Railroad System cars. That the distribution after the elimination of these cars is not such a prorating of all cars upon the line or "the equipment for distribution" as will meet the requirements of the Interstate Commerce Act has been held in several cases.

Thus, in Rice vs. Louisville & N. R. Co., 1 I. C. C., Rep. 547, it was said by Judge Cooley:

> "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. vs. Pratt, 22 Wall. 123, 133), and then to offer their use to everybody impartially. If the varieties of traffic are such and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot with any justice be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to have rolling stock and then allow

it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic."

This very language is quoted with approval in United States vs. Norfolk & W. Railway Co., 109 Fed. Rep. pages 836-7, where it was said, per Jackson, J.:

"While the capacity of the Indian Ridge mine may have been greater than its allotment of cars, yet that was shown to be the case with every other operation similarly situated in that field. In other words, the supply of coal cars was short, and the railway company simply prorated the supply on hand, without discrimination, among all the operations, the Indian Ridge included, which, under all the authorities, it not only had the right to do, but was compelled to do. Iowa Railroad Commissioners, 1878, p. 20; Riddle vs. Railroad Co., 1 Interstate Com. R. 594. And the railway's duty was not affected in the least by proof that the President of the Indian Ridge Coal and Coke Company offered to furnish the railway company cars to be used exclusively in the transportation of coal from the Indian Ridge mines; First, because these cars were to be purchased of the Indian Ridge by the railway upon the installment plan, the railway thereby becoming interested therein at once, and finally the absolute owner thereof; so that, in the event of an exclusive application of the same to the business of the Indian Ridge mines, there never would have been a time, from first to last, during which the railway company, by such a course, would not have been devoting rolling stock which it owned or was interested in as a common carrier, to the demands of one shipper, to the exclusion of another similarly situated, which it cannot rightfully do. And, secondly, because, even if it never should become interested in, or the owner of, the cars, still it may not rent its track to, or permit them to be appro-

priated by others, to the detriment of other shippers, whom it should serve to the uttermost. Even with such special cars in its service, when the stress of unusual business comes, the special cars would have to be applied to the accommodation of all shippers alike. The substance of the whole thing has heretofore been well expressed by Judge Cooley." (See quotation last above.)

So also in Rice vs. Western N. Y. & Pa. R. Co., 4 Int. Com. Comm. Rep., page 149, it was said:

"There is no force in the fact that the tank shipper furnishes his own tanks. It is not the business of a shipper to furnish the vehicle of transportation. That of the duty of the carrier. Under its franchise the carrier must do more than construct its roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation dues, whether he owns or hires his vehicle." (See also Majestic C. & C. Co. vs. Illinois Cent. R. Co., 162 Fed. 810.)

In Haring-Wilson Coal Co. vs. Wheeling & L. E. R. Co., decided December 22, 1906, before the Railroad Commission of Ohio, somewhat the same facts were presented as in this case, though not as fully, and the court held:

(1). It is the duty of a railroad to equip its roadway with the means of transportation, ve-

hicles as well as motive power, the use of which vehicles must be open to all shippers impartially. If, instead of providing itself with sufficient and suitable cars to transport the freight offered, certain of its customers, even for their own convenience, furnished their own cars, the cars thus provided should be considered part of the available equipment of such railroad.

(2). A common carrier for all transportation purposes, so far as the public is concerned, makes every vehicle its own which it uses or brings upon its road, no matter how acquired; and, it being the duty of the carrier to transport freight for all persons, in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track for any customer for his exclusive use, except upon condition that if such carrier does not provide sufficient and suitable cars to transport the freight of other customers in the order in which its transportation is applied for, such private cars may be used for that purpose.

(3) In every case where there is a system of mine rating, and the supply of coal cars, according to such rating, is not sufficient to meet the immediate requirements of shippers, all cars from whatever source and however acquired, allowed to go upon the track of the carrier and transport coal from mines on its line, must be taken into account and considered in the allotment and distribution of coal cars to shippers. And these duties of the Company cannot be altered by the furnishing of special cars to the carrier to be used exclusively in the transportation of coal for that shipper, whether sold by the shipper to the carrier on the installment plan, or the shipper retains title to the cars. Such shipper cannot, by contract with the carrier, dictate what the rule of allotment shall be, nor by any scheme or device, preclude the carrier from taking into consideration such private cars as a part of its available equipment for allotment and distribution to shippers of coal."

The Railroad Commission of Ohio discusses the question exhaustively, and the conclusion reached will be found by the court to be a very proper solution of the difficulties of car distribution.

See also, Judson on Interstate Commerce, Sections 189, 191 and 193.

After its decision above referred to, the Railroad Commission of Ohio filed a complaint before the Interstate Commerce Commission, upon the hearing of which the very questions presented by the record in this case were exhaustively considered and on the 11th day of July, 1907, in an able opinion by Clark, Commissioner, in the case of Railroad Commission of Ohio et al., vs. The Hocking Valley Railway Company, No. 1008 (12 I. C. C. Rep. 398) the Commission held as follows:

> "Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called 'private' cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or 'private' cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Com-

plaint alleges unjust discrimination against other coal operators along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or 'private' cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such 'private' and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered, and such company should not be given, in addition to such delivery, a share of the system cars except when the number of 'private' and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars."

So also it was said in Worcester Excursion Car Co. vs. Pennsylvania R. Co., 3 Int. Com. Comm. Rep. 577, page 587:

"Under the rules settled by the Commission in the two cases of Rice and Scofield, *supra*, there is no question whatever of the existence of the power to regulate the rates and methods of the carrier in these cases. It is wholly immaterial to that regulation whether the cars used by the carrier are owned by it or whether the carrier obtains them from others, for the rates must be the same and all shippers must be treated alike in furnishing sufficient cars and facilities by the carrier for

the freight. These rules recognize that for all the purposes of such service, the cars, no matter whether owned by the carrier or obtained by it from others for the carriage of freight, are for all the purposes of regulation, the cars of the carrier in the performance of service over its line. They admit without friction of the same general application to every kind of freight car."

Especial attention is called to the decision in the case of Logan Coal Company vs. The Pennsylvania Railroad Company, 154 Fed., 497, the opinion in which per Holland, J., was handed down July 1, 1907. That case was a petition for mandamus under Section 23 of the Interstate Commerce Act on behalf of the Logan Coal Company, which is engaged in mining and producing bituminous coal on the Pennsylvania Railroad, to require said Railroad Company to furnish it certain cars as arbitraries. It was shown that the Railroad Company failed to provide a supply of cars to the extent demanded, at times, for the transportation of bituminous coal produced along its lines. The relator had purchased, about two years before, 150 coal cars of 100,000 pounds capacity each, for the transportation of coal produced at its mines, to its trade beyond the lines of the State of Pennsylvania. This purchase was made with the knowledge and approval of the Railroad Company, and the cars were placed upon and used on the Railroad Company's lines, for more than two years last past. It appeared that under the law of Pennsylvania the Pennsylvania Railroad Company was obliged to transport merchandise in individual cars when offered by shippers.

On January 1, 1906, the officials of the defendant company put into force and operation the following order:

"Commencing January 1, 1906, assigned cars,

i. e., cars for Pennsylvania Railroad Company fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified lines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

Since the adoption of the order of January 1, 1906, "Pennsylvania Railroad fuel cars", "especially consigned fuel cars", and "individual cars", have been taken into consideration and counted by the Railroad Company in the assignment of cars to the coal mining companies along its route, and these cars have been charged against the capacity of the mines to which they have been assigned and placed, and the owners of individual cars receive a prorated share of the company's cars on a rated capacity, represented by the difference between the full physical rated capacity of such mines and the capacity of the arbitrarily assigned cars received by it. The object of the adoption of this rule, while it is not entirely accomplished, was to place all shippers on an absolute equality, as nearly as possible, and yet not discriminate against individual car owners, or those to whom cars were especially consigned for fuel (154 Fed. 498).

The court (page 503) held that the individual and other cars should be taken into consideration in making the *pro rata* distribution of cars as follows:

> "The relator is not in any sense discriminated against. First, it has the use of its own cars, and its share of company cars upon a basis which gives it a certain advantage over its competitors, and, in addition, it receives a certain compensation from the railroad company for its cars. They are placed

upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment in order that the defendant company may be enabled to treat all shippers the same, and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its lines, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company."

* * * * * * *

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company, or fuel cars of other corporations purchasing coal from the Relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the Relator. This precise question has not heretofore been considered, but the question of car distribution to shippers, including individual and fuel cars, has been before the courts in a number of cases, and the general trend of the decisions is to the effect that all cars whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable *pro rata* to shippers desiring their use along the line, upon a basis giving each equal facilities with the other."

Section 3 of the Act to Regulate Commerce, prohibits undue or unreasonable preference; and the action of the appellee here brought about such a preference. The Railroad Company, by insufficiently equipping its road and reserving to var-

ious shippers their individual cars, the use of which is paid for by the Railroad Company at a wheelage rental, is doing, with regard to facilities, just what in the tank-car cases it was doing in regard to rates. It is giving a preference to one class of shippers, to their undue advantage, and the undue prejudice of other shippers. Every shipper is entitled to full facilities. When the railroad fills in its insufficient equipment with individual cars for the use of which the Railroad Company pays, and which are denied the poorer shipper, and rents its trackage and locomotives to a rival of appellant, who can thereby obtain the best contracts and mine and ship with regularity, the appellant to whom such cars are denied, is the victim of undue and unreasonable prejudice or disadvantage. As was said in Rice vs. Louisville & N. R. Co., 1 Int. Com. Comm. 503, page 548:

> "He has an advantage, arising from his ownership, in being able to control the use, but that circumstance can be no reason for extending to him exceptional consideration which will make the advantage specially oppressive to competitors. It is, on the other hand, a very forcible reason why the carrier should see to it that its patrons who are forced to make use of such facilities as it provides for them shall not find its own want of proper rolling stock made a ground of discrimination against them. On this point the misapprehension of the situation is very apparent in some of the arguments which have been made for the defense. The complainant, it is said, asks the railroad companies to relieve him from the consequences of his own lack of capital to carry on his business to the best advantage. He cannot choose the best method, because that method requires a large outlay in capital. His competitor in business can choose it, and it is for that reason that complainant is driven out of the market. He must blame his want of

capital, it is said, and not the railroad companies, for his failure.

"A statement of the situation differing a little from this will more nearly present the actual facts. The railroad company not having supplied itself with the necessary rolling stock to enable one branch of its traffic to be carried on in the way most advantageous to those who engage in it, suffers parties who have the capital which will enable them to supply the defect to put cars of their own upon the road, for the use of which it pays, and at the same time gives to such parties the exclusive use of what they supply, and also such preferential rates on the merchandise carried for them as will put successful competition quite out of the question. It is not the lack of capital to carry on the business that then proves fatal, but it is the lack of capital, in addition to what is needed in the business, to supply rolling stock to the railroad company for his use."

Exactly the same effect is produced, so far as the independent shipper is concerned, by the arbitrary allotment of cars for fuel coal, whether the coal is for the Pennsylvania Railroad or for other railroads.

We may, however, leave the technical consideration of the language of the statutes and decisions, and turn to the purpose of the Act, which is well known. It was, undeniably, to prohibit such discriminations by carrier companies between shippers, as will enable one to prosper at the expense of another and to restrict the carrier to its proper duties. To this end it requires the furnishing of all transportation facilities and forbids undue or unreasonable discriminations or preferences. And if the plan of the Pennsylvania Railroad Company, with reference to the distribution of cars, be held valid, what becomes of the Act and its object? The carrier desiring to prefer one shipper has only to allow him to bring his own individual cars

upon the line, or make contracts with him for the furnishing of coal to the carrier, and immediately discrimination takes place. The favored shipper's entire output is hurrying regularly to market, while his competitor must cut down production and movement of coal to the limit of a deficient car supply, which cannot even be counted on for regularity. As a necessary consequence the competitor can get no contracts involving a large and constant supply and regularity of shipment, and cannot have his coal moved. These contracts naturally go to the men who can deliver the coal. The protection of the Act is entirely taken away. If the carrier fails to keep up his equipment or to replace worn-out cars, the whole coal traffic is left to those with individual or other arbitrary cars.

Under the percentage system of car distribution, each mine should be entitled to have its *due percentage of tonnage* moved, regardless of the purposes to which the coal is to be applied. And the cars for fuel for the Pennsylvania Railroad and the cars of foreign railroad companies for fuel coal for those roads, should be counted in the percentage system of distribution, as against the mines using the same. As was shown in the evidence, it is just as important to a mine owner to have tonnage moved when the coal is to be used for railroad fuel as for other purposes and there can be no justification of a system which allows one mine to have moved an enormous tonnage, whether for fuel purposes or for any other purpose, and then permits that mine to have its full *pro rata* tonnage moved as against other shippers. The result brought about by this arbitrary allotment of fuel cars is exactly the same as the preference by reason of the use of the individual car. In fact, there is little or no difference between the foreign railroad fuel car and the indi-

vidual car of a shipper. One is the individual car of the consumer, Railway Company, and the other is the individual car of the shipper.

It is sought in this case, as above stated, to make a distinction between cars for so-called "commercial coal"—that is, coal for the ordinary consumers, industrial plants and public service corporations—and cars for "fuel coal", for use of the railway company upon whose line the mines are situated, or for other Railroads, which send their cars to the mines to be loaded. This artificial distinction is not justified by the facts. What proper difference is there, so far as its *commercial aspect* is concerned, between coal sold to an industrial plant or public service corporation along the lines of the Pennsylvania Railroad for use in engines generating power, and coal sold to the Pennsylvania Railroad Company, or the Philadelphia and Reading Railway Company for use in their engines running upon the tracks serving such industrial plant or the power house of a public service corporation? Both classes of coal are sold by the mine as an article of commerce and both are "traffic" within the meaning of that term as used in Section 3 of the Act to Regulate Commerce. Traffic is defined as the "exchange or sale of commodities, the business or employment of buying and selling". Generally coal is sold for both purposes, to be delivered to the purchaser at the mine tipple, and so far as the miner is concerned, he has no more interest in one than in the other after it is dumped over his tipple into cars. It is the duty of the railroad company as a carrier and as part of its public duty, to "provide and furnish" cars for the transportation of both classes of coal, and after it has discharged its duty to "provide and furnish" cars, then its further duty is to transport the

coal, for the industrial plant to the point where consumed, and the coal for its own use is transported to points from which it may conveniently distribute the same to engines on its lines.

It may be urged on behalf of the carrier, that it must have a regular fuel supply in order to discharge its public duty, and operate its railroads. No one will deny this proposition, but it is neither necessary nor lawful in order to secure such fuel, that the carrier should discriminate against or in favor of mines along its line, or otherwise fail to discharge its duty "to provide and furnish" cars for shipment and carriage of coal, or thereafter to discriminate in the transportation thereof.

This practice of not counting cars for fuel coal may be used for the purpose of enabling the carrier to purchase its fuel at less than the market value thereof, *and we can see no interest that the carrier would have in enforcing such an arbitrary distribution of cars other than for this purpose.* As shown by the report of the Interstate Commerce Commission to Congress of January 25, 1907, in the matter of "Discriminations in Coal and Oil", the "result of this (practice) was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal". The mine operator proposes to the Railway Company, "I will give you 25 cents per ton discount on the price of your coal, if you will give me cars in which to ship the same, and not charge them against my percentage". On a car of 50 tons, this would be $12.50, and in effect, the mine operator, in periods of car shortage, would pay to the Railroad Company $12.50 for the use of each car assigned for loading coal for the use of the carrier, and not charged against the number of cars the shipper would get, under the sys-

tem of distribution. In the same report, after full investigation of all the facts, the Commission say:

> "This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same, is unjust and unfair, unless fuel coal is taken from all of the mines on the line of road in the same proportion as the cars are distributed."

It was suggested in the examination of Mr. Wigton, that what the appellant wished was, that the individual cars, the property of other shippers, be given to it, and that such proceeding would be inequitable. This is not the case. The favored companies in this district claimed a right of ownership in certain specified cars; of cars really owned by and paid for by such companies the appellant does not seek to deprive them. They have secured the use of these cars and, so far as they are owned by them and their use does not interfere with appellant's rights, the use thereof by the companies to which they belong, was not here disputed. But the appellee Railroad Company, cannot by means of these or any other contracts deprive the shipper of its right to a *pro rata* share of the cars in use or "the equipment for distribution" upon its lines; and in determining the fair share of the appellant, all the cars upon the line, by whomsoever owned, must be taken into the calculation. To illustrate: If there were an even ten thousand cars upon the line and the A coal company's fair proportion of transportation facilities were one-tenth of all, the A company would be entitled to one thousand cars. And if, of the ten thousand, the A company "owned", or uses, by contract or otherwise, five hundred cars, the A company could be entitled to those five hundred and to five hundred more, making

its *pro rata* share, or one thousand cars. But in no way should the A company secure for itself more than its fair proportion, or one thousand cars.

But, it is said, these private cars are not the cars of the Railroad Company, that they belong to others, and that it was no hardship on appellant that the owners were given their use, and also the use of a *pro rata* of the cars actually owned by the Railroad Company. This is fallacious. These cars must be drawn by the locomotives of the Railroad Company; they occupy its tracks and obstruct its sidings. The employes who operate them are those of the Railroad Company. The motive power which hauls them and the trackage which they occupy cannot but hinder and delay, in the ordinary course of business, the movement of the traffic of other shippers over the line. All these are matters which operate to the disadvantage of competing shippers. See United States vs. Norfolk & W. Ry. Co., 109 Fed. Rep. 831; Scofield vs. Lake Shore & M. S. Ry. Co., 2 Int. Com. Comm. Rep. 90, page 114.

It is the duty of the carrier to furnish the cars and no duty of this kind rests upon the shipper. This was clearly pointed out in Rice vs. Western N. Y. & Pa. R. Co., 4 Int. Com. Comm. Rep., pages 149-150, where it was said:

> "There is no force in the fact that the tank shipper furnishes his own tanks. It is not the business of a shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct its roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors

in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties whether he owns or hires his vehicle. * * * * * If the carrier, whose duty it is to furnish vehicles of transportation, cannot afford to do so impartially for all its patrons engaged in like business, the ordinary shipper is likely to be less able to afford it, and cannot be required to perform the carrier's duty. He might as well be asked to furnish motive power as vehicles of carriage. The carrier cannot transfer his own responsibility to the shipper. The duty to furnish impartial transportation cannot be evaded on any pretext. It is fundamental and imperative."

In State vs. Cincinnati, New Orleans, etc., Ry. Co., 47 Ohio St., 130, it was said:

"It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, *yet*

the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for its private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practiced at the will of the railroad company, and the favored shipper."

To hold otherwise would be to crush the small shipper, and give the entire trade to those who can provide cars or to whom the carrier specially assigns part of its equipment. The injustice of such a course by the carrier has been pointed out by the Interstate Commerce Commission in Independent Refiner's Assn'n. vs. Western N. Y. & Pa. R. Co., 5 Int. Com. Comm. Rep. 415, where it is said (p. 433):

> "If it be not the duty of the common carrier to furnish the vehicle of transportation, then his only legal obligation is to transport over his roadbed such vehicles when furnished by others. He could not be compelled to do more, and if he chose to pursue a course, the privilege of transportation of both person and property over his line might be denied to the great mass of the public and limited to the few who were able and found it to their advantage to invest in cars for their own use. It is manifest that in such transportation there would be but a small if any element of *common* carriage; it would be a prostitution of the franchise received from the State and call for its forfeiture."

Even if it was necessary that the individual cars given to companies like the Berwind-White Coal Mining Company should be distributed in part to companies like the appellant in order to avoid discrimination, it is submitted that such distribution would not be unfair, for the reason that if the arbitrary distribution by the appellee company be carried to its logical conclusion and the region filled with the individual cars of various favored shippers, other cars might be totally excluded and the result would be that all mines not possessing individual cars or without capital to buy them would be at a standstill and under this method of distribution not be entitled to a single car. That such a condition very nearly arose in the Tyrone Region on certain occasions is shown by the data offered by the Railroad Company and found on page 78 of the Record, in which, during the months of November and December of 1902 and January and February of 1903, times when the demand for coal was great and the car shortage marked, there appeared in the region, out of 6814 cars placed in November, only 812 cars which were distributed on percentages; and in December, only 733 cars out of 7222; and in January only 559 out of 6747; and in February only 452 out of 6363.

It is obvious, therefore, that it only needed a slight increase in the Clearfield Region of individual cars, or cars carrying fuel for the railroad companies from certain favored mines, to completely eliminate the shipments of persons not enjoying the use of these arbitrarily allotted cars. It is unnecessary to comment on the injustice of such a situation.

D. On the question of damages.

The appellant showed that its mine was well able to supply and ship coal in all the cars to which it would have been entitled by its percentage rating, and in fact upon many more, and this is shown by the fact that during the months when there was little demand for coal and cars were plentiful and when the appellant received an excess of cars, it then loaded and shipped all cars received. In months of stress, when the appellant was given a deficiency of cars and the Berwind-White Coal Mining Company, among others, received an excess, the appellant has calculated the deficiency in tonnage, comparing the number of cars received with the number which it should have received according to the railroad company's rating. This deficiency in tonnage, therefore, represents coal which, if the railroad company had furnished the proper number of cars, the appellant could have mined and shipped. The appellant, as shown by the evidence, had entered into contracts and obligations to deliver coal, which required daily, weekly and monthly deliveries of which it notified the appellee. Consequently it was in a position where it was obliged to meet the obligations on these contracts and to meet them at certain regular specified times. In order to do this it was compelled to purchase coal in the open market for the purpose of supplying the deficiency which was caused by the railroad company's neglect to furnish it with its proper *pro rata* number of cars. The damage to the appellant resulted, therefore, on each ton of coal which it could have mined had the railroad company supplied its proper quota of cars, and would be the difference between the price at which the appellant was obliged to buy that ton of coal in the open market in order to fulfill its obligations, and the cost

of mining that ton of coal had it been permitted to do so by receiving from the railroad company the cars necessary to ship the coal. Accordingly, the appellant has estimated the average price per ton paid by it for coal purchased to fill its obligations and has deducted therefrom the cost per ton of royalty and mining, and multiplied the total ton shortage in each month by this difference.

This is manifestly the only proper measure of damages, since it represents the actual damage caused to the appellant by the appellee's wrongful act; for, had the appellant been unable to fill these contracts by the purchase of coal, the person who contracted with the appellant, would have been permitted to buy coal in the open market at whatever price he could get it and then have sued the appellant for whatever excess of price he was obliged to pay for appellant's breach of its duty.

The right to recover damages in a case of this character is given by Section 8 of the Interstate Commerce Act, and the damages are specified as "the full amount of damages sustained in consequence of any such violation of the provisions of this Act".

The appellee argues that the appellant is not permitted to pick out of the period covered by the statement of claim, certain months in which the appellant received a shortage of cars, but that the appellee is entitled to set off as against this shortage, the excess of cars which the appellant admits it received in the other months. In reply to this it may be stated:

1. That the unit of time of distribution under which the appellee distributed its cars, as shown by its own distribution sheets, was a day. There were varying numbers of cars in the region from day to day,

and in certain cases the percentage which was given to the different mines varies from day to day.

It is true that the appellant, in making up its calculations, has taken a month as the unit, but this is to the appellee's advantage, since in taking the average for a month, the appellee is given the benefit of all days during that month in which it furnished the appellant with an excess of cars. Where the appellee has declared its own unit, to wit, the day, the appellant might justifiably have figured its damages upon that basis. The appellee surely cannot complain if the damages as figured are more advantageous to it than if they were figured upon the daily basis in accordance with the unit adopted by the appellee.

2. Where the appellee is required by law to furnish to the appellant its proper quota of cars in the region, it certainly cannot excuse a failure to do so by an allegation that at another period it furnished an excess of cars, no more than in law it could excuse a tort committed against an individual one week by a benevolent or beneficial act done to the same party in the following week.

The testimony shows that the furnishing of cars irregularly that is, less than the mine's quota in one month, and an excess in the following month—is highly injurious to the business of coal mining (Record page 15). This evidence shows that the effect of the failure to furnish cars regularly is that the operator is unable to determine how much coal he will be able to ship at a certain specified time, and consequently is unable to meet regular recurring obligations which he has contracted for in the shape of daily, weekly or monthly deliveries of coal.

Furthermore, an insufficient and irregular supply of cars prevents the regular working of the colliery, in-

asmuch as certain fixed expenses still continue; pumps have to be kept going constantly to keep the water out of the mines while the mine itself is kept in idleness.

In addition, (Record, page 37) Mr. Wigton testified that it is absolutely essential for the conduct of the mining business that there should be a regular daily supply of cars. And furthermore, the Pennsylvania Railroad Company had knowledge of the existence of the contracts which the appellant had to fill and was therefore charged with the duty of giving to the appellant a regular supply of cars equal to its legal quota. Having this knowledge, it would now be idle for the appellee to appear and state that having given the appellant an excess of cars in certain months it is entitled to set off this excess as against the shortage which was suffered in other months (Record, page 14).

3. It is, however, noticeable, that the only occasions on which the appellant received an excess of cars was when there was no demand for the cars in the region on the part of the other shippers of coal and the price of coal in the market was low; and the occasions on which the appellant received a deficiency of cars were times when there was a scarcity of cars in the region and all shippers were desirous of having them, and when the price of coal was high, notably during the anthracite coal strike of 1902-1903 (Record, pages 13-14-15, 31-32). Under such conditions the appellee would certainly not be entitled to draw any conclusion in its favor from the fact that the months in which an excess of cars was given to appellant, were when the car supply was plentiful and there was no demand in other quarters for the cars themselves. It also serves to emphasize the point heretofore made that this being an action in trespass, there can be noth-

ing in the nature of a set-off, and the argument that the shortage of cars has been more than made good in other months falls to the ground.

It is also not true that the coal which the appellant was unable to ship in a month of shortage was subsequently shipped in the months in which it received an excess of cars; because, the appellant being obliged to fill contracts for deliveries of coal either daily or weekly, could not, upon a shortage of cars, store the could not, after receiving a shortage of cars, store the coal and wait several months and then deliver it, but was compelled to supply it at the time specified in the contract.

4. The argument that the appellant was each month a purchaser of coal and that the surplus of coal which it was able to produce and ship in the months in which it got more cars than its percentage entitled it to, enabled it to reduce correspondingly the amount of coal purchased in these months, is of no force, according to the reasoning already set forth above; but in any event there is no evidence whatever to show that there was any profit to the appellant by reason of these transactions, for it might still have been the case that because of purchasing coal when coal was cheap—as the evidence shows it was in the months when there was a surplus of cars—the price of mining coal might have been substantially equal to the cost of purchasing it in the open market.

Respectfully submitted,

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Appellant.

Philadelphia, Pennsylvania,
January 30th, 1913.

INDEX.

		Page
Introductory		1
I.	The Statute Under Which Review Is Sought	2
II.	Question Here Presented One of Practice, and Not of Jurisdiction in Sense of Power	7
III.	This Court Has Considered and Decided on the Merits Cases Brought Up by Appeal, Which Ought to Have Been Brought by Writ of Error	13

TABLE OF CASES.

Armstrong's Foundry, 6 Wall. 766	20
Babbitt v. Clark, 103 U. S. 606	10
Bevins v. Ramsey, 11 How. 185	18
Bouvier's Law Dictionary, Vol. 2	3
Bowditch Ins. Co. vs. Winslow, 3 Gray, 415	7
Brobst v. Brobst, 2 Wall. 96	22
Champion v. Brooks, 9 Mass. 228	6
Comstock v. Eagleton, 196 U. S. 99	15
Deland v. Platte Co., 155 U. S. 221	15
Equity Rules of Practice	7
Gold Washing &c. Co. v. Keyes, 96 U. S. 199	14
Hecht v. Boughton, 105 U. S. 235	19
Hutchinson v. Gurley, 8 Allen, 23	6
Jones v. LaVallette, 5 Wall. 579	20
Kirkland's Case, 14 Fed. Cases No. 7842	9
Metropolitan R. Co. v. Dist. of Columbia, 195 U. S. 322	16
Montclair v. Ramsdell, 107 U. S. 147	21
Petersham v. Dana, 12 Mass. 429	7
New England Ins. Co. v. Detroit, 18 Fed. Cases, No. 10154	9
Ormsby v. Webb, 134 U. S. 47	17
Parrish v. Ellis, 16 Pet. 376	20
Pennoyer v. Neff, 95 U. S. 714	21
Sarchet v. U. S., 12 Pet. 143	18
Shepherd v. Pepper, 133 U. S. 626	22
U. S. v. Hailey, 118 U. S. 233	19

IN THE

Supreme Court of the United States.

No. 488. October Term, 1911.

MORRISDALE COAL COMPANY,
Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-IN-ERROR.

Counsel for plaintiff-in-error in this case desire to acknowledge the courtesy of this Court in giving them opportunity to present an argument in regard to the suggestion made by the Court that the case should be dismissed because of the manner in which it was brought here. Counsel believe the assignments of error are well founded, and are fully aware of the hardship upon their client, which will ensue upon a dismissal of the case for an irregularity in practice.

The objection pointed out by the Court is, that this case was an action at law, and should have been brought up by writ of error, whereas it comes up by an appeal.

I.

The Statute under which the Review by this Court is sought.

This case is before the Court under Section 6 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals, by virtue of the following provision thereof:

> "In all cases not hereinbefore, in this Section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The entire record is before the Court, including the Bill of Exceptions in the Circuit Court, the Assignments of Error filed in the Circuit Court of Appeals, the order of that Court transmitting the record to this Court, and the citation, of which the defendant-in-error accepted service and in response to which it appeared without objection and argued the case on the merits.

It is to be noted that under the Act of Congress of March 3, 1891, establishing Circuit Courts of Appeals, Section 4 provides:

> "That no appeal, *whether by writ of error or otherwise*, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, etc."

This Section uses the word "appeal" in a generic sense, and refers to *appeals by writ of error*, which writ is only applicable to common law actions.

By Section 5 of the Act, it is provided:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases, etc."

When Section 6, however, comes to provide for appeals, in the generic sense, from the Circuit Courts of Appeals to the Supreme Court of the United States, the provision is:

> "In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error *or review* of the case by the Supreme Court of the United States, etc.";

and it will be observed that this provision of Section 6 does not follow the language of Section 5, providing for "appeals or writs of error", but adds thereto the words "or review of the case".

It is to be noted that the above provision of Section 6 of the Act of March 3, 1891, assures to plaintiff-in-error in this case "of right an appeal or writ of error *or review* of the case by the Supreme Court of the United States". This procedure is "*of right*". It may be that the technical "appeal" provided for "of right" would be confined to a case in equity, and that the technical "writ of error" would be applicable to a case at law, but there is also given to the plaintiff-in-error "of right", a "*review* of the case by the Supreme Court of the United States".

A "review" is defined to be "a second examination of a matter"; (Bouvier's Law Dictionary, Vol. 2, p. 921).

This *right* is only applicable to cases not "made final" in the Circuit Court of Appeals; and it would seem that the reasonable construction of the words "or

review" would be that Congress intended that if the record was certified and transmitted to the Supreme Court, with the assignments of error, and the parties were present, the Supreme Court should "review" the case, even though it might not be technically before the Court in the form of "an appeal or writ of error", as may be appropriate to the kind of action involved.

It may be suggested that the words "or review" in this Section of the Act, referred to a review on certificate from the Circuit Court of Appeals, or on certiorari from the Supreme Court, but this cannot be true, because the plaintiff-in-error is not entitled "of right" to a certificate from the Circuit Court of Appeals, and the issue of certiorari is discretionary with the Supreme Court, and then is only applicable under this Act to cases "made final in the Circuit Court of Appeals".

We, therefore, submit that the words "or review" in Section 6 of the Act of March 3, 1891, applicable alone to appeals in the generic sense from the Circuit Court of Appeals to the Supreme Court of the United States, was intended to assure to the party complaining "of right" a "review of the case by the Supreme Court of the United States", whether the case was presented in that Court on a technical "appeal or writ of error", and this construction of the Act interferes with no prior adjudication in this Court, for we can find no case where this Court upon this technical ground, has dismissed a case in which the record, with the assignments of error, came up to this Court properly certified from the Circuit Court of Appeals, and where the parties were in Court and not objecting to the form of the appeal. In fact we can find no case from the Circuit Court of Appeals where the question here presented was involved. And this construction of Section 6

of the Act of March 3, 1891, can present no embarrassment in the future, because in the Judicial Code of March 3, 1911 (Section 241), the words "or review of the case by", as applicable to appeals from the Circuit Court of Appeals to the Supreme Court of the United States, are omitted, and the Judicial Code, in conformity with provisions relating to appeals to the Supreme Court from other courts than the Circuit Court of Appeals, now provides:

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs."

Therefore, no question can hereafter arise as to the meaning of the words "or review" in the Act of March 3, 1891. The question here presented has never before arisen and can never arise again under this Act.

When the present case came to this Court, the Act of 1891 was in force, and the question here must be governed by its provisions, and if that Act had read: "there shall be of right a review of the case by the Supreme Court of the United States", would it have been possible to hold that if a plaintiff brought a certified record to this Court from the Circuit Court of Appeals, with the assignments of error, and the defendant appeared in response to a citation issued in the name of the Chief Justice of the United States, and without objection argued the case on the merits, the plaintiff's case would be dismissed because he did not present his "right" of "review" by a particular one of the three alternative rights given to him by the Act, namely, "an *appeal* or *writ of error*

or *review* of the case by the Supreme Court of the United States". The reasonable construction of the words "or review", in the Act of March 3, 1891, is, that Congress intended that a party should have the "right" to have this Court pass upon his case, even if there was technical irregularity in bringing the case here on appeal, when it should have been brought by "writ of error", or vice versa; and this view is not impaired, but is strengthened by the last clause of the above provision of Section 6, to wit:

> "But no such appeal shall be taken, or writ of error sued out unless within one year of the entry of the order, judgment or decree sought to be reviewed."

This clause limits the time within which a case may be brought to this Court, whether by writ of error or appeal, but once there, though irregularly brought, the right of review attaches, and the clause does not purport to limit the previous "right" given to a "review".

Prior to the Act of Congress of March 3rd, 1891, some of the States had, by statute, provision for "a review" of cases by the appellate courts, which was in addition to the usual practice by appeal or writ of error, and this writ of review, which was nothing more than a citation, (Revised Statutes of Massachusetts 1836, Ch. 99, p. 602, Section 3), was frequently used to protect litigants who made technical mistakes in suing out writs of error or in securing appeals.

Hutchinson vs. Gurley, 8 Allen 23, (1864):

By misunderstanding or mistake, no appeal was taken. A review was granted.

Champion vs. Brooks, 9 Mass. 228 (1812):

A writ of error was sued out when there should have been an appeal. Held, a writ of review would lie on application.

Petersham vs Dana, 12 Mass. 429 (1815):

Judge failed to seal bill of exceptions and Clerk failed to enter it of record. A review was granted.

Bowditch Ins. Co. vs. Winslow, 3 Gray 415 (1855):

Plaintiff-in-error did not enter exceptions in Supreme Court as required by law. A review was granted.

It is entirely reasonable to conclude that by the words "or review" in the Act of March 3rd, 1891, Congress had in view and intended that, *when a case had been regularly brought to the Circuit Court of Appeals by "appeal or writ of error",* and the case was not made final in the Circuit Court of Appeals, the parties should "of right" have "a review of the case by the Supreme Court of the United States", when the record and parties were in that Court, even though there may have been technical inaccuracy in the method of bringing the case to the Supreme Court.

II.

The question here presented is one of Practice and not of Jurisdiction in the sense of Power.

The above construction of the Act of 1891 is in accord with the views of this Court in providing for the determination by the lower courts of the real justice of a cause, without applying the technical rules which distinguish proceedings in equity from those at law. These views of the Supreme Court are expressed in the recent Rules of Practice for Courts of Equity of the United States, and have the cordial support of the bar all over this country, and of the people.

If this case had been presented by Bill in Equity filed in the District Court of the United States, and a subpoena had issued under the equity practice, although the subject matter of the action was

only cognizable by a court of law, when in fact, all the pleadings presented a case in equity, this Court would not permit the District Court to dismiss the proceeding, but, under the rules of practice for the courts of equity recently promulgated by this Court, the cause would be transferred to the law side of the Court, and the pleadings altered to conform to the practice in a proceeding at law, so far as necessary.

Rule 22 of the Rules of Practice for the courts of Equity of the United States, is as follows:

> "22. Action at Law Erroneously Begun as Suit in Equity.—Transfer.—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This rule was promulgated in the interest of justice, and does not permit the District Court to dismiss a cause on the suggested technical ground as to the form of pleading. The rule confers no jurisdiction upon the District Court on the law side which it did not have before, for the jurisdiction of the court could only be created by Congressional action, and this Court, under its authority to promulgate rules, could not enlarge the jurisdiction of the District Court, and therefore, it could hardly be said that the District Court on the law side did not have jurisdiction, in the sense that it had no right to entertain the case before the rule was promulgated, and by like reasoning, it can hardly be said that the Supreme Court would not have jurisdiction to determine the merits of a cause at law which may have been presented to it in pleadings applicable to a case in equity.

If it should be suggested that the Supreme Court has no jurisdiction, in the sense that it has no right to review an action at law brought to it by process applicable to an equity case, because at the time the Court's appellate jurisdiction was created an action at law must be brought to this Court by "writ of error", and an equity suit by "appeal", we answer that this reasoning is no more applicable to the Supreme Court than it would be to the Circuit Courts under the Act of March 3rd, 1875, c. 137, Sec. 1, (U. S. Compiled Statutes, Vol. 1, p. 507), by which the Circuit Courts of the United States are given jurisdiction "of all suits of a civil nature at common law or in equity", and when the Circuit Courts were created, an equity suit could be brought only by Bill in Equity, with a subpoena requiring an answer to the bill, and an action at law by filing a declaration with a writ requiring the defendant to appear and demur or plead to the action of trespass, covenant, etc., as the case might be. It can hardly be said that the Circuit Courts had no jurisdiction in the sense of no power to entertain a cause of action at law which was presented to it by Bill in Equity, for the Circuit Courts are now required, by Rules of Practice for the Courts of Equity (No. 22), to "proceed with" such case, and if the Circuit Courts had no jurisdiction the Rules established by this Court could not enlarge the jurisdiction. *In re Kirkland*, 14 Fed. Cas. No. 7842; *New England Ins. Co. vs. Detroit &c.*, 18 Fed. Cas. No. 10,154.

Our view is that requiring the District Courts to consider an action at law which may have been presented by Bill in Equity, was a regulation of practice in the District Courts which the Supreme Court might prescribe under Section 917 of the Revised Statutes, and did not enlarge the jurisdiction of the District Courts.

By like reasoning, if this Court heard a case at law brought to it by appeal, it would not be enlarging its jurisdiction, but would be waiving without objection of the parties the practice which regularly should prevail, but which this Court has frequently disregarded when the parties were in Court and no objection was made. *Babbit v. Clarke,* 103 U. S. 606.

The record properly certified with the assignments of error, is before this Court; the defendant is in court in response to a citation issuing in the name of the Chief Justice of the United States, has made no objection and has argued the case on the merits.

It seems to counsel that it would be a great hardship upon the plaintiff-in-error if this case were dismissed for want of a writ of error, when the real purpose of such writ was accomplished when the record was filed. In other words, that which the writ would require has been done, and the parties are before the Court, the plaintiff-in-error asking for its right to a review of the case without objection from the defendant-in-error.

In fact, this Court, as we will hereafter show, has exercised the right of passing upon a law case when presented to it by an "appeal", and which, under the strict rules of the common law, should have been presented by "writ of error". We, therefore, submit that this Court should not dismiss the present case because it was brought by appeal instead of by writ of error, but should now enforce the same rule for guidance in the determination of this question, which it has prescribed as the rule of practice to govern the District Courts where irregularity similar to that here presented occurs; and it is further submitted that the Court, if necessary, should direct that the process upon which the case is brought to this Court, be altered "as shall

be essential" to enable the Court to pass upon the justice of the complaint presented by the record.

Everything essential to enable the Court to pass upon the questions involved in this case is before it, as fully as if a writ of error had been sued out.

A transcript of the record, proceedings and papers upon which the Circuit Court of Appeals acted, duly authenticated, has been sent to, and is now on file in this Court, under order of the Circuit Court of Appeals entered on the 11th day of January, 1911, (Record, p. 125). The Assignments of Error which would have come up from the Circuit Court of Appeals with a writ of error, are here, certified by the Clerk of the Circuit Court of Appeals (Record, p. 127). A bond was filed, which, while it is called an appeal bond, is evidently for the same purpose as if the bond had been given upon a writ of error (Record, p. 125). A petition was filed asking that the transcript of record be sent to this Court for its review (Record, p. 124). A citation was issued running in the name of the Honorable Chief Justice of the United States, upon which the defendant-in-error accepted service (Record, p. 126), and the Pennsylvania Railroad Company is present in court without objection, to show cause why the action of the Circuit Court of Appeals should not be corrected "and speedy justice should not be done to the parties on that behalf" (Record, p. 126). It appears that instead of a writ of error issuing, the Circuit Court of Appeals, allowed "an appeal" for the purpose of reviewing its action. This being the state of the record, the only irregularity suggested, is that the parties, without objection, are before the Court under a process which should be used in an equity case, asking it to administer "speedy justice", whereas they should have been here under a writ issued in a common law case. We, there-

fore, submit to the Court that the harsh penalty which this Court does not permit the District Courts of the United States to enforce in case of mistake analogous to this, should not be applied by this Court to a case involving only an irregularity in bringing a case to this Court for its consideration.

If this were a case in equity which should have come to this Court on appeal, and had come up by writ of error, there might be some difficulty in the way of the Court considering the same, because a writ of error only brings up questions of law, and therefore the writ of error not bringing up questions of fact, the Court might not be able to dispose of the whole case; but this case is in fact a law case and appears to have come up by appeal, which brings up the entire record *upon the law as well as the facts.* Everything is before the Court to enable it to pass upon the questions of law, without passing on the facts. Indeed, only questions of law are raised by the assignments of error in this case.

We cannot think that there is any doubt that this Court *has the right,* where the record is present, and the parties have appeared and argued the case on the merits without objection, to pass upon the questions involved, notwithstanding the record may have been brought to this Court on appeal, when technically it should have been here by writ of error.

The questions presented by this record are important, to the public as well as to plaintiff-in-error, and a decision of this Court thereon is especially important at this time in order to clear away the uncertainty which exists, as to the jurisdiction of the Courts and the Interstate Commerce Commission under the Act to Regulate Commerce; and if within a year after the record came to this Court, this technical question had been raised, we would have had opportunity to

save the rights of our client, which will be absolutely lost if the appeal is dismissed for this irregularity. The time within which to apply for a writ of error, if the case is dismissed, has expired, and the action is barred by limitations.

We feel that if this Court *has the right* to consider this case on the record and pass upon the questions presented, the essential hardship which would occur by dismissal of the case will incline the Court to pass upon the questions presented, which are here before the Court in exactly the form, (except as to the language of the writ), in which they would have been presented on a technically regular writ of error.

III.

This Court has considered and decided cases brought here by appeal which should have been brought by writ of error.

In the case of *Babbitt vs. Clark,* 103 U. S. 606, an action at law was brought in the State Courts of Ohio. On petition the case was removed to the Circuit Court of the United States for the Northern District of Ohio, and upon motion the Circuit Court of the United States remanded the case to the State Courts, and to reverse that action of the Circuit Court, the case was taken to the Supreme Court of the United States *by appeal. The appellee insisted that the Supreme Court had no jurisdiction "because if reviewable at all, this case should have been brought here by writ of error, rather than appeal".* In discussing the question, Mr. Chief Justice Waite, at page 611, says:

> "Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was

in equity an appeal should be taken. That is the fair import of the phrase, 'writ of error or appeal as the case may be'. This was a suit at law, and consequently should have been brought up by writ of error. There seems to have been very little attention paid to this distinction heretofore, and we now find that we *have often considered cases on writ of error that ought to have been presented by appeal, and on appeal when the proper form of proceeding would have been by writ of error.* No objection was made, however, at the time, and we did not ourselves notice the irregularity. Without deciding whether we would reverse the order of a Circuit Court if objection were made when the case was brought up in a wrong way, we are not inclined to delay a decision on the merits in this case because of the irregularity which appears, as we think the suit was properly remanded, and the order to that effect should be affirmed." (Italics ours.)

It will be observed in this case that the Court considered the case and affirmed the judgment below, notwithstanding the fact that objection *to the jurisdiction was urged by the appellee.*

In the case of *Gold-Washing & Water Co. vs. Keyes,* 96 U. S. 199, a bill in equity was filed in a State Court of California. A petition was filed to remove the suit to the Circuit Court of the United States for the District of California, and upon motion the Circuit Court remanded the case to the State Courts, and "to obtain a review of this action of the Circuit Court the present writ of error has been brought under the provisions of Section 5 of the Act of 1875, which gives authority for that purpose", and notwithstanding that it appears in the case that the effort was made by writ of error to review the action of the Circuit Court in an equity case, this Court considered the case and affirmed the Court below.

There are, of course, cases in this Court where it was attempted by appeal to review final judgments in cases at law, which were dismissed by the Supreme Court on the ground that the Court could only review a judgment in an action at law on a writ of error; but in every case we have found, where such action was taken by the Supreme Court, either there *was no appearance* in that court by the defendant-in-error, or a motion to dismiss was duly made by the defendant-in-error on the ground that the judgment could not be reviewed except on writ of error.

In the case of *Comstock v. Eagleton,* 196 U. S. 99, an action was brought to recover damages for false imprisonment. A demurrer was sustained and the petition dismissed. The case was taken to the Supreme Court of Oklahoma, and the judgment affirmed, and from the judgment of affirmance an "appeal was allowed and prosecuted to" this Court. The appeal was from the Supreme Court of Oklahoma and was not under the Act of March 3rd, 1891, which allows "of right" a "review" as well as "an appeal or writ of error". It appears from the report of the case that *"there was no appearance or brief for defendant in error",* and thereupon the opinion of the Court was delivered by Mr. Chief Justice Fuller, saying, (page 100):

> "Final judgments of the Circuit Courts of the United States in actions at law can only be revised on writs of error. *Deland v. Platte County,* 155 U. S. 221; *Met. Railroad Company v. District of Columbia,* 195 U. S. 322; *Bevins v. Ramsey,* 11 How. 185; *Sarchet v. United States,* 12 Pet. 143."

An examination of these cases, cited by the Chief Justice, shows that in the case of *Deland v. Platte County,* 155 U. S. 221, an action of assumpsit was

brought in the Circuit Court of the United States for the Western District of Missouri, judgment was entered for the defendant, and motion made "for appeal, which motion was by the Court sustained and appeal allowed." It further appeared that "no writ of error was issued or citation signed, *and no appearance has been entered for the County of Platte*". On this state of the record, Mr. Chief Justice Fuller delivered the opinion of the Court, saying, at page 222:

> "Whatever the course pursued in the courts of the State of Missouri under the statutes of that State in relation to the allowance of appeals, the appellate jurisdiction of this court is regulated by the acts of Congress, and final judgments of the Circuit Court in cases such as this can only be revised on writ of error."

In the case of *Metropolitan Railroad Co. v. District of Columbia,* 195 U. S. 322, it appeared that there was a judgment in an action at law, to review which there was first granted an appeal and then a writ of error issued.

In this case the appellant, or plaintiff-in-error, as it may be, itself raised the question as to whether the case should be presented to this Court on appeal or by writ of error, and filed in the Court of Appeals of the District the following motion:

> "And now comes the appellant by its counsel and shows to the Court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions it may be that the proper remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this Honorable Court, in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October, 1902, it may also be allowed a writ of

error to said Court, and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error."

Upon this motion the writ of error was allowed. In the brief filed for the appellee in the case, it is stated (page 34):

> "The record (page 40) seems to indicate that the case is here by writ of error, but there is no statutory provision for writ of error, and none would lie, for this proceeding was not according to the course of common law."

In delivering the opinion of the Court, Mr. Justice White (page 329) said:

> "Now, as it is settled by the authorities previously referred to that the proceeding in question was legal in its nature and not one of equitable cognizance, and as it has also been settled that the jurisdiction of this Court prior to the Act of 1883, to review the final judgments or decrees of the Supreme Court of the District of Columbia, did not give power to review by appeal, a matter not of equitable cognizance, *Ormsby v. Webb*, 134 U. S. 47, 64, it necessarily follows that we are without jurisdiction to review the action of the Court of Appeals of the District of Columbia on the appeal here taken, and that appeal must, therefore, be dismissed."

The judgment was affirmed on the writ of error.

In the case of *Ormsby v. Webb*, 134 U. S. 47, 64, referred to in the case above cited, an action was brought to determine the competency of the deceased to make a will, and a writ of error was issued to review the final judgment of the Supreme Court of the District of Columbia. The point was made in this Court that the case was one of equitable cognizance,

and could not be reviewed on a writ of error, but only upon appeal, *and a motion to dismiss the writ of error was made by the appellee,* which motion was overruled on the ground that the judgment was in an action at law.

In the case of *Bevins v. Ramsey,* 11 How. 185, cited in Comstock vs. Eagleton (*supra*), the only report of the case is the following sentence:

> "This action at law was dismissed because brought here by appeal instead of writ of error."

In the case of *Sarchet v. United States,* 12 Peters 143, cited by Mr. Chief Justice Fuller in Comstock vs. Eagleton (*supra*), an action was brought in the District Court of the Southern District of New York, upon a bond, for duties charged by the Collector upon certain iron imported into the United States. A judgment was rendered in the District Court against the defendants, and they removed the case by writ of error to the Circuit Court for the Southern District of New York, which affirmed the judgment of the District Court, and the case was then taken to this Court "by appeal from the judgment of the Circuit Court". It appears in the report of the case that *"the Attorney General has moved to dismiss the case for want of jurisdiction in this court, and we think the appeal cannot be sustained."*

So it will be observed that in every case cited by Mr. Chief Justice Fuller in the case of *Comstock vs. Eagleton,* 196 U. S. 99, at page 100, there was either no appearance in the Supreme Court for the defendant-in-error, or appellee, indicating that no proper writ had been served which required appearance, or the defendant-in-error or appellee appeared and moved *to dismiss the case on the ground of the irregularity in the pro-*

ceedings. Not one of these cases was on appeal from the Circuit Court of Appeals, and the Court was not passing on the right to a "review" under the Act of March 3rd, 1891.

In the case of *United States v. Hailey,* 118 U. S. 233, it appeared that the United States was represented in this Court by the Attorney General, *but that there was "no appearance for appellee".* Mr. Chief Justice Waite delivered the opinion of the Court as follows:

> "This case has been docketed here as an appeal from the Supreme Court of the Territory of Idaho, but, on looking into the transcript, we find that the suit was at law and the trial by a jury. Under such circumstances the only proper way of bringing it here for review would have been by writ of error. *Stringfellow v. Cain,* 99 U. S. 610; *United States v. Railroad Co.,* 105 U. S. 263; *Hecht v. Boughton,* 105 U. S. 235; *Woolf v. Hamilton,* 108 U. S. 15. In point of fact, however, *there has been neither a writ of error, nor an appeal, nor a citation, nor an appearance by the defendant or respondent.* It is clear, therefore, we have no jurisdiction, and the case is dismissed." (Italics ours.)

It is to be observed that the Court dismisses the case and calls attention to the fact *that there had been no appearance, and that there was neither a writ of error, nor an appeal, nor a citation,* nor any jurisdictional fact.

In the case of *Hecht v. Boughton,* 105 U. S. 235, Mr. Chief Justice Waite delivered the opinion of the Court, saying:

> "This is a writ of error to the Supreme Court of the Territory of Wyoming to bring up for review the judgment in a suit where there was not a trial by jury. *A motion is now made to dismiss because the case should have been brought here*

> *by appeal and not by writ of error.*" (Italics ours.)

and the motion to dismiss was granted.

In the case of *Armstrong's Foundry*, 6 Wall. 766, at page 769, Mr. Chief Justice Chase, delivering the opinion of the Court, said:

> "The proceedings below related to a seizure of land, and though conducted under the statute in the forms of admiralty, must be regarded as a case of common law jurisdiction, a final decision in which can be reviewed here only on writ of error."

But the Court considered the questions in the case and entered an order reversing the case and remanding the same with directions to allow a new trial.

There are numerous other cases which were dismissed in the Supreme Court, either on motion to dismiss because of improper procedure, or where there was no appearance for the defendant, among them *Parrish v. Ellis*, 16 Peters 376; *Jones v. LaVallette*, 5 Wall. 579. From our examination of the cases in this Court where the question here presented was involved, we have been unable to find any case where this Court has, of its own motion, dismissed a case after appearance by the parties because it was brought by appeal instead of by writ of error; and only in those cases where there was no appearance for the defendant-in-error or appellee, or where there was a motion to dismiss filed, have the cases been dismissed.

In none of the cases above discussed or referred to was the appellate proceeding governed by the Act of March 3, 1891, and many of them were decided before the passage of that Act. We can find no case where the language used in the Act of March 3rd, 1891, is passed upon and we insist that the language therein,

assures to parties, "of right", a "review" of decisions of the Circuit Court of Appeals, which the statutes applicable to other appeals did not in terms give when technically construed.

In all actions *in personam*, personal service of process is a necessary pre-requisite to the jurisdiction of a Court. (*Pennoyer vs. Neff*, 95 U. S. 714.)

We submit that the jurisdictional pre-requisites with reference to the appellate jurisdiction of this Court are, service of citation (or its equivalent by the appearance of the party to be cited, or a waiver by him), and the presence of the record before the Court. The procedure by which the record arrives in the Court, and under which the party appears, is not jurisdictional. Were this otherwise, the orders of reversal or affirmance made by this Court in the cases hereinabove cited, where it has made such orders although the record was before it by an irregular method, would now be void for want of jurisdiction. The erroneous procedure merely confers a right on one of the parties to have the case dismissed on his motion, and if that right is waived, the jurisdiction of this Court is unaffected. But whatever doubt may have existed on the question of jurisdiction prior to the Act of 1891, was completely removed by the insertion in that Act of the right given to the complaining party of "a review" of the case in this Court. This Court has held that "It is the duty of the Court to give effect if possible to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employs". *Montclair vs. Ramsdell*, 107 U. S. 147, 152.

We therefore submit that the application to the case at bar of the word "review", hereinabove contended for, gives a proper value to that word, which would otherwise be ignored. Congress must have in-

serted the word for some purpose, especially as it omitted it in other parts of the Act of 1891, which treat of appeals and writs of error with respect to courts other than the Circuit Courts of Appeals.

In conclusion, it is suggested that inasmuch as the office of a writ of error is to bring to this Court a record in a law case for the purpose of correction of any error of law existing in such record, and inasmuch as the record in a law case is now before the Court, this Court has the power, if deemed essential, to issue a writ of error *nunc pro tunc,* returnable as of the date on which the record in this case was filed. This would be somewhat analogous to the practice in certiorari, where the record is filed with the application for the writ, and upon the granting thereof by stipulation of the parties the record so filed is considered as a return to the writ, and no actual return by the Clerk of the lower court is made. If the Court deems it necessary we now ask that an order be entered directing a writ of error to issue *nunc pro tunc.* This Court has heretofore allowed an appeal bond to be filed *nunc pro tunc*:

Shepherd vs. Pepper, 133 U. S. 626, 644.
Brobst vs. Brobst, 2 Wall. 96.

But we think this is not necessary in view of the argument presented by this Brief.

For all the reasons hereinabove stated, we submit that the case should not be dismissed, but decided on the merits.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff-in-Error.

CHARLES L. FRAILEY,
A. S. WORTHINGTON,
Of Counsel.
April 25th, 1913.

FILED.
MAR 17 1913
JAMES H. McKENN
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No. 207. October Term, 1912.

IN THE

SUPREME COURT OF THE UNITED STATES

MORRISDALE COAL COMPANY,
Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Brief in Reply on Behalf of the Plaintiff-in-Error.

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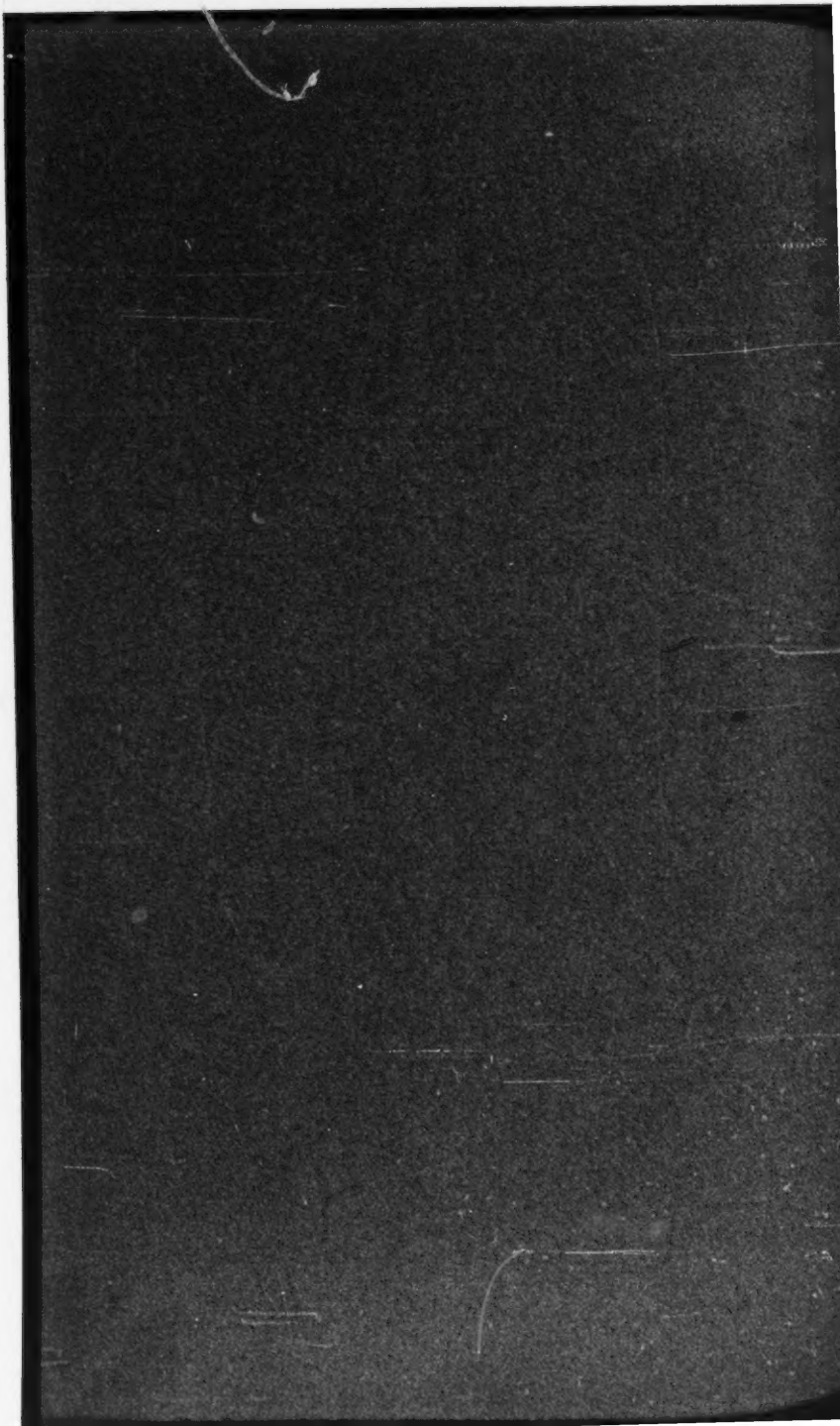

IN THE

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Appeal from the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

I. In the Statement of the Case contained in the brief of the Defendant-in-Error, criticism is made of the statement in the brief of the Plaintiff-in-Error to the effect that the rule of car distribution applied by the Defendant-in-Error to the region in which the mine of the Plaintiff-in-Error was situated during the period complained of, was uniformly violated by the Defendant-in-Error; and certain quotations are made from the record for the purpose of substantiating this criticism.

It is to be noted that the contention of the Plaintiff-in-Error is that the Pennsylvania Railroad Company established a rule for car distribution, under which rule they assigned to each of the mines in the territory *a percentage of the equipment for distribution,* based upon the rated capacity of the mine. This is clearly demonstrated by the testimony from the record (p. 13). Having established this rule the Plaintiff-in-Error's complaint is that the Pennsylvania Railroad uniformly violated it.

The quotation cited from pages 57 and 58 of the record is a description of the violation of the rule thus laid down by the Pennsylvania Railroad Company, which violation was uniform. In other words, the Pennsylvania Railroad Company having laid down a rule for the proportionate distribution of the equipment of the road, proceeded arbitrarily to violate such rule by taking out of the calculation such portion of the equipment for distribution as was represented by individual cars, foreign railway fuel cars and company fuel cars, and refusing to allot them under this rule. This is all that the testimony sets forth.

The extract taken from the opinion of the learned trial Judge, (pp. 83, 84 Record) is merely a statement of the method of violation. This is evident from the language of the opinion, as follows:

> "The result was that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class, while the plaintiff received only its ratable proportions of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes."

The statements of counsel quoted from pages 64 and 65 of the Record, are simply a re-statement of the same violation.

The testimony as to the rule in force, and the only testimony in the case as to such rule, is that of the plaintiff himself (Record, p. 13; quoted pp. 47-48, Appellant's paper book), in which he describes the method of rating the capacities of the mines, and proceeds to say that the rule was that each mine was assigned a percentage of the equipment for distribution; *i. e.* the coal-carrying cars in the region—upon the basis of the rated capacity of each mine. The taking of the individual cars, the foreign railway fuel cars, and the Pennsylvania Railroad fuel cars out of this equipment for distribution was therefore a distinct violation of this rule, and it was to this violation that objection was made. This is distinctly the complaint in the Statement of Claim (quoted pp. 45-46, Appellant's brief).

II. On the question whether the appeal from the decision of the District Court should have been taken directly to this Court, the case of Darnell vs. Illinois Central Railroad Company, 225 U. S. 243, cited by the Defendant-in-Error, in its brief, exactly supports the contention which is made here on behalf of the Plaintiff-in-Error. In that case a petition was filed to recover an excess charge over the reasonable rate. A demurrer to this petition was filed by the defendant, and sustained, on the ground that the declaration failed to allege that the plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. Thereupon the United States Circuit Court filed a certificate to the effect that the cause had been dismissed solely upon the ground of the want of jurisdiction, and a writ of error was taken direct to the Su-

preme Court. This was dismissed by the Supreme Court, stating that the issue so raised did not call into question the jurisdiction of the Court below as a Federal court, and that the question involved was "but the equivalent of saying that the declaration did not state a cause of action because of the failure to allege the existence of a supposed condition precedent to recover in a court of law, namely, a finding by the Interstate Commerce Commission that a right to reparation was possessed by the plaintiff."

The Court went on to say:

> "Under these circumstances it is clear that the question of whether the plaintiff was entitled to relief prayed in the absence of an averment of previous action by the Interstate Commerce Commission involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the Court below, as a Federal Court, becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a State Court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the Court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding and does not come within the purview of the authority to directly review in certain cases conferred upon this Court by the Act of 1891. *Bache v. Hunt*, 193 U. S. 523; *Fore River Shipbuilding Company v. Hagg*, 219 U. S. 175; *United States v. Congress Construction Company*, 222 U. S. 199."

All this is identical with the case now before the Court. In the present case the action might have been

brought either in the State Court or the United States Circuit Court. The present case on its facts, is absolutely parallel to the case just quoted. In that case the plaintiff demanded damages and failed to set forth in his statement that his right to recover damages had been passed upon by the Interstate Commerce Commission. In the present case, the plaintiff claims damages and the Court below decided that the evidence did not disclose any finding on the part of the Interstate Commerce Commission. One was a demurrer to the statement, the other a demurrer to the evidence. They are in effect the same. It becomes equally apparent that they do not, under the decision of Darnell vs. Illinois Central Railroad Company, involve the jurisdiction of the Court below as a Federal Court. In each case "the failure to allege the existence of a supposed condition precedent to recover in a court of law, viz., a finding of the Interstate Commerce Commission", is absent.

The point decided by the Circuit Court was hardly a question of jurisdiction, but that the plaintiff's evidence was insufficient to show a cause of action. This was the position taken in the appellant's opening brief, page 26, as follows:

> "It was more in the nature of a finding that the plaintiff's evidence did not show that the Interstate Commerce Commission had primarily passed upon the matters involved in the case, than a finding that the Circuit Court of the United States, as a Federal Court, was without jurisdiction."

And this view is in accordance with the opinion of the Supreme Court in the case of *Darnell vs. Illinois Central Railroad Co., supra.*

Respectfully submitted,

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
for Plaintiff-in-Error.

March 13, 1913.

14

NO. 207 OCTOBER TERM, 1912

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IN THE

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MORRISDALE COAL COMPANY
Plaintiff in Error

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Defendant in Error

Appeal from the United States Circuit Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

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SUBJECT INDEX

	PAGE
Statement of the Case	1
Argument	11
Right of this Court to Review under present Writ of Error	11
Right of Circuit Court to Entertain the Action	18

LIST OF CASES REFERRED TO

Baltimore & Ohio Railroad Company vs. United States, ex rel. Pitcairn Coal Company, 215 U. S. 481	19
Darnell vs. Illinois Central Railroad Company, 225 U. S. 243	16
Davis vs. Railway Company, 217 U. S. 157	16
Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S. 452	13, 19
Robinson vs. Baltimore & Ohio Railroad Company, 222 U. S. 506	24
Texas & Pacific Railway Company vs. Abilene Cotton Oil Company, 204 U. S. 426	24

IN THE

Supreme Court of the United States

October Term, 1912. No. 207.

MORRISDALE COAL COMPANY

Plaintiff in Error

vs.

PENNSYLVANIA RAILROAD COMPANY.

Defendant in Error

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

STATEMENT OF THE CASE

The plaintiff in error's "Statement of the Case and Questions Involved" requires correction, for it contains material errors or inaccuracies.

It is therein stated that the damages claimed in the action were those "arising from not furnishing plaintiff its proportion of cars for shipment of coal *under the rules established by the appellee and for violation of its rules resulting in unjust discrimination against the appellant.*" Later on it is said that "the rule of car distribution" established by the defendant in error and in force during the period of the action was "uniformly violated" by it with respect to

the plaintiff in error, and the same statement, in effect, though couched in different language, is repeated several times.

All of these statements are incorrect. It was conceded by the plaintiff in error that it had received the cars to which it was entitled under the rule established by the defendant in error and in force during the period of the action, and that if this rule, therefore, was a just and reasonable one, it had no case.

The defendant in error's rule which governed the distribution of its cars among its coal shippers and the basis of plaintiff in error's claim were thus stated by the learned trial Judge in his opinion sustaining the defendant in error's motion to dismiss the case for want of jurisdiction:

> "The railroad company determined the capacity of the various mines in the region by a computation that is not complained of, and thus arrived at the proportion of cars to which the plaintiff and other miners would be entitled when cars were too few to meet the demand completely. This proportion was applied to the deficient car supply in the following manner; Each day the total number of cars available for the whole region was ascertained by the railroad company, and a distribution sheet was then made up, allotting to the plaintiff and the other miners the cars to which the defendant's method of distribution showed them to be entitled. The total available cars consisted of four classes; those that belonged to private individuals or corporations; those that were to be filled with coal that the railroad company had bought for its own use as fuel; those that belonged to foreign railroad companies, and were also to be filled with coal that these companies had bought for their own use as fuel; and system, or company, cars — meaning such cars as did not belong to either of the first three classes but were available

generally for the carriage of coal. If the railroad company had distributed the total number of these four classes ratably among the mines according to capacity the plaintiff would not be now complaining. But a different method was pursued. From the total number of available cars the defendant deducted the aggregate of the first three classes—assigning the private cars to the individuals or corporations who owned them or were entitled to use them and assigning its own fuel cars and the fuel cars of foreign railroads to the mines from which supply was to come—and distributed the fourth class alone in proportion to capacity. The result was that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class while the plaintiff received only its ratable proportion of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes. Averring injury by this method of distribution, and asserting that the total number of the four classes without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination."

(Transcript of Record, pages 83, 84.)

That the rule referred to and summarized in the foregoing extract was that in force during the period of the action was established by the evidence of the President of the plaintiff in error, who on this point testified as follows:

"By MR. GLASGOW:

"Q. Then, under the system which the Pennsylvania Railroad Company had in effect during the period covered by this suit, they did not charge those cars (i. e., individual, and the company's own fuel cars) against the number that the person who had them was entitled to under his percentage?

"A. No. During this period of time they always informed me that those were all eliminated and what was left of their own equipment was divided among the various mines on the pro rata basis.

"Q. Then the foreign railroad fuel cars, cars coming in every day, the Philadelphia and Reading, or the Lehigh Valley—they are used by the Pennsylvania Railroad Company for transporting coal from mines to those railroads?

"A. Yes.

"Q. And they are placed at mines where the foreign railroad, as you call it, has purchased coal, and are shipping that coal, and they are not charged against the number which the party using them is entitled to under his percentage. That is true?

"A. During this period of time they used the foreign railroad cars in precisely the same way that they used the individual cars or their own fuel supply cars, exclusively. They have changed that now.

"Q. They have changed it now?

"A. They have changed that situation.

"Q. They are counted now?

"A. In a manner. In a measure they are counted now.

"Q. The individual cars are now counted in a way?

"A. Yes.

"Q. And the fuel cars?

"A. Yes.

"Q. The railroad company's own fuel cars are counted?

"A. Yes.

"Q. That has been since 1906, has it not?

"A. I think 1906 was the time.

"Q. The railroad company changed the rules so as to count, in a manner—

"A. They did.

"Q. —these cars against the party using them?

"A. They did.

"Q. After taking out these cars which they assigned arbitrarily to these mines using them, and did not count them, then what cars are left they divided on this percentage basis?

"A. They did."

(Transcript of Record, pages 57, 58.)

After the testimony above quoted had been introduced, the following admission was made by counsel for the plaintiff in error:

"We will admit in this case—and I will for Mr. Wigton (*i. e.*, President of plaintiff in error)—that if the cars of individual coal operators are not to be counted in the distribution, but are to be assigned arbitrarily to that operation or to the persons designated by it; if fuel cars for the Pennsylvania Railroad are to be assigned to the party using them, shipping coal for the use of that company, and not count those cars against the percentage to which the man using them is entitled; if the cars of foreign railroads sent into the mines and used by them are to be treated as arbitrary allotment and not counted against the number of cars that the man using them is entitled to under his percentage; then we have no claim here which we can assert, for we think that, after taking out all of

> these arbitrary allotments of cars, that the Pennsylvania Railroad Company has given to us the percentage of this small residue which is left."
>
> (Transcript of Record, page 64.)

And again, later on, counsel for the plaintiff in error, referring to the distribution made to the shipper in whose favor it was alleged the defendant in error had discriminated, said:

> "May I just remark to your Honor one further word, in connection with the admission; if the Berwind-White Company's cars, which I have mentioned, should not be counted, your Honor will understand that our claim falls, if that is determined, because we have gotten what cars we were entitled to on that basis."
>
> (Transcript of Record, page 65.)

The theory of the plaintiff in error as to the rule which should have governed the defendant in error in the distribution of its cars is sufficiently disclosed by the statement prepared by it from the records of the defendant in error (known and referred to throughout the testimony as the "Car Distribution Sheets") which will be found at page 27 of the Transcript of Record. This statement shows the number of cars which the plaintiff in error claimed it should have received in the months embraced therein, and this number is ascertained, as the statement shows, in the following manner:

The total number of cars of all classes is shown, and the number of these which the plaintiff in error, under its theory, should have received is determined by allotting to it whatever percentage thereof its mine's rating entitled it to.

Thus, in the first month embraced in this statement, that of March, 1902, it is shown that the total number of

cars placed at all mines in the region in which plaintiff in error's mine was located numbered 6135. It will be noticed that these are designated in the statement as "Total wooden cars in region," and that the figure of 6135 exceeds in the aggregate the number of steel cars and other cars which are shown in the statement as having been placed in the region. This apparent discrepancy, however, is due to the fact that because of the greater size and capacity of the steel cars these were counted as the equivalent of two wooden cars, and as the distribution was made upon a wooden car basis, the total cars for distribution in the region calculated upon a wooden basis were always in excess of the actual number of cars placed if these included any steel cars.

In this month of March the defendant in error had for distribution 6135 cars. The plaintiff in error, having regard to the ratings of all mines in the region and the rating of its own mines, was entitled, under its theory, to 4.2% of these 6135 cars, or 257 cars. It actually received 461, as the statement shows, and consequently in that month received 204 cars more than it was entitled to under its own theory of car distribution.

Each month embraced in this statement is dealt with in the same way, and in some the plaintiff in error is shown to have received an excess of cars, and in other months to have received less than, under its theory of distribution, it ought to have received.

The figures embraced in this statement in respect to the distribution made to the Berwind-White Coal Mining Company are immaterial to any issue in the case and were apparently introduced merely for the purpose of showing an excessive delivery of cars to that Company based upon the plaintiff in error's theory as to the method that should have been pursued by the defendant in error in distributing its cars.

That the figures do not show an excessive delivery to the Berwind-White Company, except upon the plaintiff in

error's theory of distribution, is established by the admission of counsel for the plaintiff in error above referred to.

That the statement to which we have been referring included all cars placed at the mines in the region in which the plaintiff in error's mine was located was admitted, as will appear from the following extract from the Transcript of Record:

> "Mr. Glasgow: I will state, as Mr. Wigton has stated, that this statement is prepared and gives the total number of cars in the region each month for the shipment of coal.
>
> "Mr. Gowen: If you will say in addition to that, that it includes the individual cars belonging to certain shippers, that it includes the fuel cars placed by the Pennsylvania Railroad Co. for its own supply, and fuel cars of foreign railroads, consigned to mines on the Tyrone Region for their supply—
>
> "Mr. Glasgow: If that is a fact—I mean, if there are any such cars on the sheet, then our statement embraces those. It includes everything on the sheet."
>
> (Transcript of Record, page 18.)

The number of cars of the three classes referred to in this colloquy which were shown on the distribution sheets of the defendant in error and which were consequently embraced in this statement, is shown by the statement which will be found at page 77 of the Transcript of Record, from which it appears that the cars shown by these sheets as having been placed at the mines in the Tyrone Region in the years 1902 to 1905, both inclusive, were as follows:

	Individual	Company coal	System	Commercial. Foreign	Box	Total
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

By the declaration or statement of claim, the plaintiff in error alleged and averred that in the period between January 1, 1900, and December 31, 1905, the defendant in error had failed to deliver to it the cars which it claimed it should have received, under the theory of distribution already referred to.

Upon the trial its evidence was confined to certain months in this period. It did not show what the distribution had been in any of the months preceding March, 1902. As to the months beginning with March, 1902, the claim was narrowed down and limited to but 14 out of the 46 months embraced in the period, because it was admitted that in the remaining 32 months the plaintiff in error had received cars in excess of its percentage, even when this was ascertained in accordance with its own theory. As to these 32 months, the President of the plaintiff in error testified as follows:

> "Q. Those were excluded because in all those months you had cars in excess of the percentage you were entitled to?
>
> "A. Yes; in some quite a large excess and in others just a little, a trifle, but always an excess."
>
> (Transcript of Record, page 41.)

The effect upon the plaintiff in error's claim, accepting as correct its own theory of distribution, of the inclusion of all the months in the years 1902 to 1905, both inclusive, is shown by the statements which will be found at pages 75 and 76 of the Transcript of Record, from which it appears that in each of these years the plaintiff in error received cars sufficient to enable it to ship a larger percentage of the rated capacity of its mine than the mines, as a whole, received in the region in which its mine was located.

At the close of the testimony by agreement of the parties a special verdict was rendered by direction of the Court,

by which the jury found that the plaintiff's claim, if it was to be ascertained in the manner set forth in a certain Exhibit filed by it, was correct as to amount, the question whether it was properly ascertained being reserved for the consideration of the Court. (See Transcript of Record, page 78.)

The questions thus reserved were not passed upon by the Circuit Court because of the conclusion reached by it that it was without jurisdiction to pass upon and determine these, which conclusion resulted in the dismissal of the case.

Following this order of dismissal, the plaintiff in error appealed to the Circuit Court of Appeals. The jurisdiction of that Court to review the action of the Circuit Court was raised by the defendant in error through a motion to dismiss the appeal. This motion was overruled, the question of jurisdiction of the Circuit Court to entertain the case was passed upon, and the action of that Court in dismissing it for want of jurisdiction was sustained.

Before the Circuit Court of Appeals the plaintiff in error contended that that Court had the right to pass both upon the question of jurisdiction and upon the other issues involved in the case, notwithstanding the fact that these other issues had not been passed upon by the Circuit Court. This contention was controverted by the defendant in error, the position taken by it being that the only issue which the Circuit Court of Appeals could consider was that which involved the jurisdiction or right of the Circuit Court to entertain the action.

The Circuit Court of Appeals held that the other issues than that of jurisdiction were before it to such an extent at least as to justify the appeal to that Court. If that Court had not so found, it is clearly inferable from the opinion delivered by it that the motion made by the defendant in error to dismiss the appeal would have been sustained, for in the opinion of Circuit Judge Lanning overruling this motion the jurisdiction which the Circuit Court of Appeals

regarded as at issue was that of the Circuit Court as a Federal Court.

> "The Circuit Court," said Judge Lanning, "concluded that the Interstate Commerce Commission had original jurisdiction in the case and therefore it refused to enter judgment for the plaintiff on the special verdict and entered judgment dismissing the action for want of jurisdiction. *The question of jurisdiction was one concerning the jurisdiction of the circuit court as a federal court.*"
>
> (Transcript of Record, page 119.)

ARGUMENT

RIGHT OF THIS COURT TO REVIEW UNDER PRESENT WRIT OF ERROR.

Before considering the question of the power of the Circuit Court to entertain the action reference should be made to the question of the right of this Court to review under the present writ of error the judgment of the Circuit Court dismissing the case, and of the Circuit Court of Appeals sustaining such dismissal, for if the judgment of the Circuit Court was only open to review through an appeal directly to this Court, then it would seem that the case is improperly here, and that the writ of error should be dismissed on this ground.

Under the decisions of this Court it would seem to be indisputable that if the question of jurisdiction which was presented to, and resolved by, the Circuit Court had reference to its jurisdiction or power as a Federal Court, the judgment of that Court can only be reviewed through and by means of a writ of error directly from this Court.

And it would seem to be equally indisputable that the jurisdiction of the Circuit Court as a Federal Court is involved whenever its jurisdiction is questioned or attacked

upon the ground of lack of power under the Federal Constitution or Statutes to determine the controversy.

In the present case the action was brought to recover damages which the plaintiff in error claimed it had sustained due to the establishment and enforcement by the defendant in error of a rule or regulation providing for the distribution of its coal car equipment which rule or regulation the plaintiff in error alleged was unlawful because violative of the provisions of the Interstate Commerce Act.

The action was brought in the Circuit Court, not because of the citizenship of the parties, for they were both citizens of the same State, but because of the character of the action, and the jurisdiction invoked was that which was assumed to have been conferred upon the Circuit Court by Section 9 of the Interstate Commerce Act.

Unquestionably the Section of the Interstate Commerce Act thus invoked purports to, and does, confer jurisdiction and power upon Circuit Courts to entertain certain proceedings or actions, and necessarily it would seem to follow that if the extent of the jurisdiction or power thereby conferred is questioned or challenged, a case is presented which involves the extent of the power and jurisdiction of such Courts, not as Courts of general jurisdiction, but as courts of the United States exercising powers conferred upon them by a Statute of the United States.

The effect of the dual grant of power contained in Section 9 of the Interstate Commerce Act has been the subject of consideration by this Court in several cases, and the conclusion to be drawn from the decisions in these cases is, we submit, that in respect to questions similar to that with which we are concerned in the present case, the Circuit Courts have not had conferred upon them by this Section power to pass upon the validity of rules or regulations of a carrier of the character involved in the present case, because of the intention of Congress, as evidenced by other provisions of the Interstate Commerce Act, that

such rules and regulations should be subject to the regulatory administrative power and control of the Interstate Commerce Commission, and of that body alone.

The present is not a case in which the Court would be empowered to exercise its jurisdiction for the purpose of determining the matter in controversy, provided some preliminary action had been had by the Interstate Commerce Commission, as would seem to be the contention of the plaintiff in error, because, as we read the decisions of this Court, the power to determine the matter in controversy would still be non-existent in the Courts, even although action in respect thereto had been had by the Commission.

The matter in controversy in the present case is what method or system of car distribution should have been pursued by the defendant in error, and it would seem to be a necessary conclusion from the decision of this Court in the case of *Interstate Commerce Commission vs. Illinois Central Railroad Company*, 215 U. S. 452, that the Circuit Courts were without power, not merely to pass upon and determine this question primarily, but even to do so after action in respect thereto by the Interstate Commerce Commission, for in that case it was held by this Court that the determination by the Commission of the correct method of distribution which should be pursued by a carrier was binding and conclusive upon the Courts.

It is of course true that the conclusion reached by this Court in respect to the lack of power of the Circuit Courts to take jurisdiction of controversies of the character involved in the present case has been rested, in part at least, upon the view that Congress intended by the Interstate Commerce Act to confer upon the Interstate Commerce Commission exclusive jurisdiction to determine controversies of such a character, and it consequently may be urged that as the grant of this exclusive power to the Interstate Commerce Commission affects all courts, State as well as Federal, any objection to the jurisdiction of the Circuit

Courts based upon this grant of power to the Commission applies as well to any other Courts, and that as a consequence the issue raised by such an objection is not one affecting the jurisdiction of Federal Courts as such, but is one affecting the jurisdiction of all courts.

Any such contention, however, would seem to be answered by this consideration, that an action of the character of the present one, which involves alleged violations by a common carrier of obligations or prohibitions imposed upon it, or to which it is made subject, by the Interstate Commerce Act, must, because of Section 9 of that Act, be brought either before the Commission or in the Federal Courts, and consequently the grant of power to the Interstate Commerce Commission can operate only as a limitation upon the power or jurisdiction of the Federal Courts.

But even though this grant of power to the Commission could operate in some way to restrict or limit the powers of State courts, this consideration should not, we submit, have the effect of converting what would otherwise be a limitation upon the power of the Circuit Courts as Federal Courts into some other sort or kind or limitation upon the powers of these Courts, and this view, it would seem, is sustained by the decision of this Court in the case of *Davis vs. Railway Company*, 217 U. S. 157. In that case an action had been brought in a State court of Iowa, and under the laws of that state writs of attachment had issued under which certain cars of the defendant had been seized. The case was subsequently removed to the Circuit Court of the United States, and following this removal a motion was made on behalf of the defendant to quash and set aside the service of the attachment. This motion the court sustained, and as it also held that it had not otherwise acquired jurisdiction over the defendant, the action itself was dismissed. Thereupon the plaintiff sued out a writ of error and removed the case to the Circuit Court of Appeals, which,

on motion of the defendant in error, dismissed the writ upon the ground that the question involved was one affecting the jurisdiction of the Circuit Court as a Federal Court, and that the writ of error should consequently have issued from this Court.

Following this decision of the Circuit Court of Appeals, the plaintiff in error in that court, and the plaintiff in the Circuit Court, sued out a writ of error to this Court, and thereupon a motion was made by the defendant to dismiss the writ of error on various grounds, one of which was that the jurisdiction of the court as a Federal court had not been put in issue, and that as a consequence the writ of error had been wrongfully issued.

This Court, however, dismissed this motion, and in its opinion adopted as the basis of its judgment the following extract from the opinion delivered by the Circuit Court of Appeals:

> "Were the cars and credits of the defendant subject to judgment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for the want of jurisdiction. In respect to the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of the trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of judgment and garnishment of the property of a non-resident because the power of the court to proceed to trial depends in the absence of

the defendant upon the lawful seizure of his property. The question of jurisdiction was decided in favor of the defendant, and the decision disposed of the case."

In the case to which we have just referred the objection to the power or jurisdiction of the Circuit Court which was treated by this Court as a challenge of its jurisdiction as a Federal Court was one which would have applied equally to a State Court, but notwithstanding this fact it was held that the objection raised an issue as to the jurisdiction of the Circuit Court as a Federal Court.

In the case of *Darnell vs. Illinois Central Railroad Company,* 225 U. S. 243, this Court was required to determine whether a writ of error directly from the Circuit Court to it was justified under the circumstances of that case. The plaintiff in that case had commenced an action in a State Court to recover the excess paid by him as a shipper of lumber over the rate which in his declaration he averred had been found by the Interstate Commerce Commission to have been a reasonable rate for the service rendered. While the declaration averred that the rate paid by the plaintiff had been in excess of that which was declared by the Commission to be a reasonable rate, it did not aver that the plaintiff had applied to, and had secured from, the Commission any order of reparation.

The case was removed from the State to the Circuit Court upon the ground of the diverse citizenship of the parties, and in the Circuit Court the defendant demurred to the declaration upon the ground that it failed to disclose a cause of action, due to the failure to aver that an order of reparation had been obtained from the Commission.

The Circuit Court sustained the demurrer, and thereafter dismissed the case, and filed a certificate to the effect that the order of dismissal was "based solely on the ground that the declaration disclosed the infraction of no right arising under or out of the Federal laws or Constitution of which this Court *now* has jurisdiction." Thereupon a writ of error was sued out directly to this Court, which

writ was subsequently dismissed upon the ground that this Court could not directly review the correctness of the order of dismissal.

In this case it is to be observed that if the view upon which the Circuit Court acted was correct, viz., that the question at issue—the case having originally been instituted in a State Court—was the jurisdiction of that Court rather than of the Circuit Court to entertain the action, the jurisdiction of the latter Court as a Federal Court was of course not involved.

Moreover, the plaintiff in the case to which we are referring was proceeding under a section of the Interstate Commerce Act, viz., Section 16, for the recovery of an amount claimed to be due as the result of an order or decision of the Interstate Commerce Commission, and under the provisions of this section such an action was maintainable both in the State and Federal Courts, while in the present case the right of action asserted, which is necessarily under Section 9 of the Act, is not cognizable by State Courts.

But apart from these considerations, the conclusion reached by this Court in this Darnell case is not, we submit, at all inconsistent or at variance with the contention advanced by us. The plaintiff in that case, treating the action of the Interstate Commerce Commission as legally equivalent to an award in his favor of the amount which he had paid in excess of a reasonable rate, brought the action to recover this amount. It was of course essential that his declaration should show the necessary preliminary action of the Commission, this being essential not for the purpose of establishing the jurisdiction or power of the Court to entertain the action, but to establish that the plaintiff had a cause of action.

> "Whether the plaintiff," said the Chief Justice, delivering the opinion of the Court, "was entitled to the relief prayed in the absence of an averment of previous action by the Interstate Commerce Com-

mission, involved merely the determination of whether there was a cause of action stated."

Unquestionably the Circuit Courts of the United States have jurisdiction to entertain actions to recover amounts due plaintiffs in whose favor an award had been made by the Interstate Commerce Commission. If a plaintiff, therefore, brings an action to recover an amount which he claims was thus awarded to him, the jurisdiction and power of the Court to entertain the action cannot be successfully denied, but if the plaintiff should fail to establish its case by its proofs, it will not fail because of lack of jurisdiction of the Court to entertain the action. Nor could the failure of a plaintiff in such a case, due to its omission or neglect to sufficiently set forth its case in its declaration, be ascribable to the want of jurisdiction on the part of the Court to consider and determine the action any more than in the case where the failure results from some invalidity or insufficiency in the proofs.

In the Darnell case both the Court in which the action had been originally brought and the Court to which it was removed were undoubtedly possessed of the power and jurisdiction invoked by the plaintiff, but the failure of the plaintiff to state a case prevented the exertion of the power or the exercise of the jurisdiction thus invoked.

In the present case the Circuit Court was asked to exercise a power or jurisdiction which it did not possess, not because of any failure on the part of the plaintiff to sufficiently state or prove its case, but because the power or jurisdiction invoked was not possessed by the Circuit Court, but had been conferred by Congress upon the Interstate Commerce Commission.

RIGHT OF CIRCUIT COURT TO ENTERTAIN THE ACTION

To entitle the plaintiff in error to recover, it was essential, we submit, that three propositions should have been established by it.

1. That the rule or system established and pursued by the defendant in error in the distribution of its cars was transgressive of the provisions contained in the Interstate Commerce Act prohibiting discrimination by a common carrier.

2. That the rule or system advocated by the plaintiff in error should have been pursued by the defendant in error in making the distribution of its cars.

3. That in making distribution of its equipment in any given period of time a carrier is guilty of discrimination if it fails in any month in such period to allot and deliver to each shipper his or its pro rata of cars, and that overdeliveries in other months more than sufficient to make good the shortage in any one or more months cannot be taken into consideration.

That all of these propositions were primarily, at least, for the consideration of the Interstate Commerce Commission has, we submit, been settled by the decisions of this Court.

The cases of *Interstate Commerce Commission vs. Illinois Central Railroad Company,* 215 U. S. 452, and *Baltimore & Ohio Railroad Company vs. United States, ex rel. Pitcairn Coal Company,* 215 U. S. 481, have established that that Commission has been empowered to determine the systems or methods of car distribution that should be pursued by carriers in times of car shortage, and that the determination of that body as to the system or method to be pursued in order to avoid discrimination between shippers is controlling upon the Courts.

In the present case the plaintiff in error attacked as discriminatory and as consequently unlawful the regulation or rule which had governed the defendant in error in the distribution of its equipment, and sought to have substituted therefor a different regulation or rule as the one which should have governed in such distribution.

Certainly it cannot be denied that under the decisions to which we have referred the power and authority of the Interstate Commerce Commission must be regarded as extending to and embracing the authority necessary to pass upon and determine whether the method or system of the defendant in error was proper, and if not, whether that advocated by the plaintiff in error was the proper and correct one.

If this be true, then necessarily the exercise of primary jurisdiction by the Court in the present case was subject to the objection which was so forcibly stated by the present Chief Justice in the Pitcairn case, and which is embodied in the following extract from the opinion delivered in that case:

> "A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

But it is urged upon behalf of the plaintiff in error that the question involved in the present case was not one affecting the reasonableness or validity of a rule of distribution adopted and pursued by the defendant in error, but that the plaintiff in error's claim was based upon the alleged failure of the defendant in error to allot and deliver to the plaintiff in error the cars which it was entitled to receive under the rule which the defendant in error had established and which was in force during the period of the action.

The facts which we submit demonstrate that the cause of action was rested not upon the failure of the defendant in error to observe its own rule or system of distribution, but upon the alleged invalidity of the rule itself, have been referred to in the "Statement of the Case," which is contained in this brief. It is hardly necessary, in view of what the Record, we believe, so clearly shows in this respect to refer to anything else than is contained in this "Statement." That both of the Courts below understood and acted upon the theory that the issue involved had to do with the validity of the defendant in error's rule of distribution, and not with any alleged infractions of it, is established by the opinions delivered both by the trial Judge in dismissing the case for want of jurisdiction, and by the Circuit Court of Appeals in sustaining his action.

After referring to the character of the rule which governed the defendant in error in the distribution of its equipment during the period of the action, Judge McPherson, in his opinion dismissing the case said:

> "Averring injury by *this method of distribution*, and asserting that the total number of the four classes (i.e., of cars) without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination.

"It will at once be observed that the suit requires a Court and jury to decide whether the defendant's *method of distribution offended against the Act.* The questions are, (1) whether *this method* gave a preference to any particular person, company, firm or corporation or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable."

(Transcript of Record, page 84.)

And in the opinion of Circuit Judge Lanning of the Circuit Court of Appeals, the point at issue and which that Court considered as determined by its decision was thus stated:

"For the present, it is sufficient for us to say that, in our opinion, a party claiming to be injured by a *discriminatory rule for the distribution of coal cars* cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case and determined by its report *that the rule* is or was discriminatory. The determination of that question, at least, involves only the performance of administrative functions, which, under the act, are to be performed by the Commission, and not by any Court. Whether, after the Commission has found *such a rule* to be discriminatory, it is its duty to proceed to assess the damages, if any, which the complaining party has sustained, or whether they are to be recovered by an action in some court without any preliminary assessment by the Commission, is a question which, since it has not been argued before us and since its decision is not necessary to the disposition of the case we now have in hand, we should not at present decide."

(Transcript of Record, page 112.)

But the further contention is made upon behalf of the plaintiff in error that, conceding that the decisions of this Court to which we have above referred have determined that primary jurisdiction is vested in the Interstate Commerce Commission to pass upon and determine the validity of the rules and regulations of a carrier of the character with which we are concerned in the present case, when the question involved relates to rules or regulations still in force, this primary jurisdiction of the Commission does not attach, and is not exercisable in respect to the validity of rules or regulations which have been abrogated by the carriers before they have been made the subject of complaint. But manifestly this contention can have no force unless the act of a carrier in abrogating one of its rules or regulations has the effect of depriving the Interstate Commerce Commission of the jurisdiction which it otherwise would have had to pass upon and review the validity of such regulation, and, if found invalid or unlawful, to prescribe the rule or regulation which should have governed the carrier in lieu of that thus condemned.

Certainly there is nothing in the Interstate Commerce Act which would justify the conclusion, or even inference, that the carrier by its voluntary act can thus put an end to the supervisory powers of the Commission over its practices and its rates. For if the discontinuance or abrogation of a rule relative to distribution of equipment can prevent the Commission from investigating the reasonableness or validity of such rule, the same result would follow the discontinuance or abrogation of a rate.

But not only is there nothing in the Interstate Commerce Act which affords any warrant for the contention advanced by plaintiff in error in this recpect, but when the reasons are considered which have induced this Court, not only in the two cases above alluded to, but in the case in which there was first considered the effct upon the jurisdiction of the Courts of the grant of power made to the

Commission by the Interstate Commerce Act to pass upon the reasonableness of a carrier's rates and regulations, it will at once, we submit, be apparent that there is no more reason for holding the primary power of the Commission to be exclusive in respect to existing rates and regulations than there is for holding it exclusive in respect to past regulations or rates.

This Court reached the conclusion that it did in the case of *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, mainly because, in its opinion, it was essential, in order to secure equality of treatment of shippers, that issues affecting the reasonableness of rates should be determined primarily, at least, by the Interstate Commerce Commission. It is just as important, in order that equality of treatment among shippers may be secured, that the reasonableness of rates or regulations or practices, even although these may have been abrogated or discontinued, should be determined by the Commission, otherwise shippers may fare very differently as the result of diverse and conflicting actions by courts and juries.

The following extract from the opinion of Judge McPherson sustaining the motion to dismiss so clearly and conclusively answers the plaintiff in error's contention with which we are dealing that we feel we cannot do better than quote it as embodying what we believe to be the correct view of the subject:

> "Since, therefore, the Commission alone has the power to decide primarily whether a particular method of distributing coal cars in case of shortage is preferential, I do not believe that the power is automatically transferred to the courts as soon as the carriers substitute another method, and merely for the reason that the substitution has been made. The procedure of submitting the question of discrimination to different courts and juries has been authoritatively declared to

be objectionable; but if it must nevertheless be followed in every case where the damages claimed were caused by a practice that has been changed, the uncertainty of results to which the Supreme Court has referred will bring about the very discrimination which the Act seeks to avoid. If one injured shipper recovers a verdict and another fails; or if one recovers a sum calculated according to a particular rule, and the sum awarded to his neighbor is calculated according to a different rule; an obvious discrimination among the claimants must result, for the theory of all the verdicts must be that the sums recovered fully repair the damages suffered, while it is evident that reparation is in fact partial or unequal. Inequality in recovery would necessarily produce discrimination. If, on the other hand, such claims must be submitted in the first instance to the Commission, they will be acted upon uniformly, will be adjusted according to the same rule—a rule that will presumably be adopted after a full and comprehensive view of the whole situation and of all the relevant circumstances—and the damages will be awarded, not arbitrarily or capriciously, but by the application of the same standard."

But really the plaintiff in error's contention that the exclusive primary jurisdiction of the Commission continues only during the existence of a rule or regulation or rate of a carrier is answered and disposed of by what was said by this Court in the Abilene case, for the following extracts from the opinion in that case are, we submit, totally incompatible and irreconcilable with the limitation upon the power of the Commission which is contended for by the plaintiff in error:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commis-

sion to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Page 442.)

"When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. *And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was in force by the carrier, and before its change and the establishment of a new one.* In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the Statute to secure, and, on the other, from enforcing that equality which the Statute commands." (Page 446.)

Indeed, neither in the Abilene case nor in the case of *Robinson vs. Baltimore & Ohio Railroad Company, 222* U. S. 506, in which this Court held that a shipper complaining of a discriminatory rate could not recover in the absence of evidence showing action by the Interstate Commerce Commission condemning the rate complained of and awarding reparation, was it affirmatively shown that the rates, the exaction of which had given rise to the actions, were still in existence, and certainly if this Court had considered

the existence or non-existence of the rates as not merely a factor, but a determining factor, in determining the jurisdiction of the Courts, some reference would have been made to this circumstance. Evidently it was considered wholly immaterial whether the rates complained of were or were not in force at the time the actions were instituted.

But the further contention is advanced by the plaintiff in error that the Interstate Commerce Commission has determined the method of car distribution which should have been pursued by the defendant, and that the system thus approved did not accord with that which was in force throughout the period of the action.

It might be sufficient to say as to this contention that in the case of *Robinson vs. Baltimore & Ohio Railroad Company* (*supra*) this Court determined that decisions of the Commission which were not properly proved and put in evidence could not be considered, and in the present case, the record discloses no decision of the character referred to.

It is true that the Commission has in a number of cases determined the system or method of car distribution which should be pursued by carriers in times of car shortage, and has so determined in respect to the system which should have been followed by the defendant in error. It is also true that it found the rule or system of distribution complained of by the plaintiff in error in the present case objectionable and unlawful, but it is also true that the system or rule which it prescribed as the one that should be followed and observed by the defendant in error was not that which the plaintiff in error contends for and which forms the basis for its claim for damages in the present case. This system the Commission declined to approve and enforce.

So that if this Court were at liberty to refer to the rulings of the Commission, and were to determine the issues involved in the present case with reference to, and in accord-

ance with, these rulings, the necessary conclusion, we submit, would be that both the systems of distribution contended for by the parties hereto were objectionable and invalid.

But plaintiff in error makes this suggestion or point: Granting, it says, that it was not entitled to share in the distribution of all the cars which were placed by the defendant in error at the mines in the region in which its mine was located, due to the fact that some of these cars were the individual or private cars of other shippers, that some were the cars of the defendant in error which were placed at certain mines to be loaded with coal for its own fuel supply, and that still others were cars of other railroad companies which had been delivered to the defendant in error in order to be placed at certain mines from which the companies, owners of these cars, were drawing their fuel supply (and under the rulings of the Interstate Commerce Commission these three classes of cars are not regarded or treated as distributable), nevertheless it established, as it contends, a *prima facie* case by the proof adduced by it that in the months which it selected from the whole period of the action it had not received its pro rata share based upon its mine ratings of all the cars, including those of the three classes named, that were placed at the mines in the region, and that this *prima facie* case had not been rebutted or overthrown by testimony adduced upon the part of the defendant in error.

Briefly this contention amounts to this: That a shipper who is entitled to share in the distribution of one out of four different kinds or classes of cars establishes that he has not got the share of the one class in the allotment of which he was entitled to participate by proof that he has not got his share of the aggregate of the four classes.

Some propositions have only to be stated in order that their unsoundness may be demonstrated, and this contention seems to be one of that character.

The evidence adduced by the plaintiff in error itself established that in estimating the number of cars which it claimed it should have received of those which the defendant in error placed at the mines in the region in which the plaintiff in error's mines were located, it had treated as distributable all of the cars of every character which were placed at these mines. Its evidence did not show how many of these cars were of a character which would remove them from the distributable class. If this was a matter of any moment or significance, this omission was supplied by the evidence presented by the defendant in error, which showed the number of cars of each class which were included in those placed at the mines in this region. The contention, therefore, of the plaintiff in error was fully answered, if there was any necessity for an answer, which is embodied in the following extract from the argument embraced in its brief in this case:

(Record, page 77.)

> "If the appellee relies upon the fact that a certain number of cars were of special character and therefore to be taken out of the general distribution, we submit that the burden is upon it to show the number of such cars and the proof being insufficient to establish the number of such cars, the appellant cannot be defeated on this ground.
>
> (Brief of Appellant, page 61.)

The third proposition above referred to was also one, we submit, for the primary consideration and determination of the Interstate Commerce Commission. The contention of the plaintiff in error was that the distributable cars should have been so allotted and distributed that in each month included within the period of the action the plaintiff in error should have received its proper pro rata thereof, and that a method of distribution under which the shortages of any one month could be made up in succeeding

or other months did not comport with or fulfill the obligations to which the defendant in error was subject in respect to the distribution of its cars.

In one sense it is true, as contended for by the plaintiff in error, that the distribution of its cars by the defendant in error was a daily act, but it is only true in the sense that this distribution was made daily. As a matter of fact, it was more in the nature of a continuous act, and while it was doubtless incumbent upon the defendant in error to allot daily to each shipper, when reasonably practicable, his pro rata of the cars which were available for distribution on that day, it was not, we submit, incumbent upon it to ignore and disregard its own interests and to subject itself to burdensome conditions and excessive expense in an effort to accomplish this result. If all carriers were conducting their operations under conditions which were so similar as to make a uniform rule on this subject reasonable and practicable, there might be some justification for the contention that a Court could reasonably determine what periods of time should be considered in determining whether there had been a failure on the part of the carrier to properly distribute its cars, or in other words, what periods could be properly allowed for equalizing distribution, which must necessarily be unequal for short periods. But, as is perfectly well known to this Court, the conditions affecting carriers are so different that no uniform rule could be framed on this subject which would be fair or would adapt itself equitably to the varying conditions existing on different roads.

Where a railroad company has but a few mines to supply with cars, and these are located in one, and that a restricted, region or territory, the problem of equal distribution is a comparatively easy one, as compared with that confronting a railroad company which, like the defendant in error, has over 500 mines to supply with cars, located in various districts or regions, and spread over a territory

more than 100 miles in extent. Manifestly, under such circumstances, there are features or problems to be considered and determined which are not presented in the case of the carrier which is not called upon to consider the many and complex features which necessarily confront the de-defendant in error.

Some uniform rule as to each carrier would have to be adopted and applied as to the period within which deliveries could be equalized without injustice to shipper or carrier, and such a rule could only, we submit, be established by action of the Interstate Commerce Commission. Courts are really less competent and less fitted to deal with this problem than with one which had to do with the proper system of distribution.

Inasmuch, therefore, as the Circuit Court would have been required in the exercise of the power and jurisdiction invoked by the plaintiff in error to exercise and usurp powers and functions withheld from it and conferred by Congress upon the Interstate Commerce Commission, it committed no error in declining to take jurisdiction of the case and in dismissing the same.

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